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THE ECONOMIC AND SOCIAL ASPECT OF TRUSTS.

"WHAT shall we do with trusts?" has of late become an absorbing theme of public discussion. Indeed, the public mind has begun to assume a state of apprehension, almost amounting to alarm, regarding the evil economic and social tendencies of these organizations. Nor is this apprehension limited to professional agitators and chronic alarmists. It is shared in by all classes. Our foremost journalists, essayists, orators and publicists unite in warning us against the evil consequences to be expected from the organization of trusts, syndicates and the like. In fact, the social atmosphere seems to be surcharged with an indefinite, but almost inexpressible fear of trusts.

In the present state of the public mind upon the subject, to raise a hand against trusts is, *a priori*, a righteous act. It practically constitutes a standing invitation to politicians, — who, though unfamiliar with economic principles, are very sensitive to public favors, — to enact all sorts of arbitrary laws restricting industrial enterprise, on the principle that to injure a trust is to perform a public service. To such an extent is this true that, in one form or another, the proposition to limit these organizations by law has been discussed in both national and state legislatures. Commissions of investigation have been appointed and in some instances restrictive legislation has already been adopted. In obedience to this feeling, one of the great political parties has actually made opposition to trusts a national issue. The interests of industrial and social freedom demand that a

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truce be called; at least, until we ascertain whether we are really engaging a public enemy or simply pursuing an industrial phantom. In order to do this, it is necessary carefully to consider what the economic and social aspects of trusts are.

At the outset, it is important clearly to distinguish between the economic character of the organizations and the personal character of the individuals conducting them, because the evils arising from the one require an entirely different kind of treatment from that applied to those caused by the other. If a grocer gives light weight, if he puts sand in his sugar, or peas in his coffee, or if a merchant sells mixed goods for all wool, — that would hardly be a justification for suppressing grocery stores and dry goods houses. In considering the economic and social aspect of trusts, we are not concerned with the personal character of Jay Gould, or the president of the Standard Oil trust, or any manager of great railroad syndicates, but only with the necessary economic and social tendency of the enterprises over which they preside.

The first step in the inquiry is to ascertain what constitutes the distinguishing economic characteristic of trusts. In what, for instance, do they differ, as industrial institutions, from corporations, individual capitalists, or even from hand workers? The more closely we examine the subject the more clearly we shall see that they are all fundamentally the same; that the difference is not one of principle, but solely of size and complexity of industrial organization. The hand laborer organizes industry on a very simple basis, and on a small scale. His own personal energy and a few primitive tools are the only means he is capable of employing. The individual capitalist or *entrepreneur* differs from the hand laborer in that he organizes industry on a more complex basis, and on a larger scale. Instead of being confined to his own personal energy and such tools as he himself is capable of using, he employs a number of individuals together, divides and specializes their labor, and uses it in conjunction with steam-driven machinery. The corporation differs from the individual capitalist in that it consists of the association of a number of capitalists, who, by a greater

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concentration of capital, are enabled to organize industry on a still more complex and extensive basis. And similarly, trusts, which are the latest form of industrial phenomena, differ from the corporation in that, instead of being composed of individual capitalists, they comprise corporations, which, through a still greater concentration of capital, make a more minute differentiation and a higher integration of industrial energy possible. The economic difference between the trust and the corporation, and that between the corporation and the individual capitalist, is not that one is an aggregation of corporations, another of individuals, and the third a single individual; but, like the difference between the hand laborer and the individual capitalist, it consists entirely in the fact that one represents a greater aggregation and concentration of capital than the other.

Manifestly, then, the distinguishing economic characteristic of trusts consists of the maximum concentration of capital in productive industry. Therefore the real question involved in considering the economic and social aspects of trusts is: Does the concentration of capital in productive enterprise, whether under trusts, syndicates, or otherwise, necessarily involve economic or social disadvantage to the community? The popular answer to this question is an emphatic, yes! Among the numerous charges upon which trusts and kindred organizations are indicted as public evils are the following:

(1) That they tend to build up monopolies and drive small capitalists out of business;

(2) That they destroy competition, the great minimizer of profits and equalizer of prices;

(3) That they amass fortunes at the expense of the community by increasing the price of commodities;

(4) That they tend to build up an oligarchy which controls legislation in its own interest against that of the community, thereby undermining personal and political freedom, and endangering the existence of democratic institutions.

If these are the necessary results of trusts, it is clearly the duty of the public to check their development. Before taking any steps in that direction, however, it is highly important to

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ascertain whether these charges are true, and if true, whether they are the inevitable result of such organizations.

First: Is it true that the concentration of capital tends to build up monopolies? Much here depends upon what is understood by the term monopoly. If by monopoly is meant merely the exclusive power to produce a commodity, this exclusive power may be either an evil or a great benefit, depending entirely upon the way it is obtained. If it is procured through the arbitrary exclusion of competitors, it will surely be an evil; but if derived from the capacity to make the article more cheaply than others, through the use of large capital and superior methods, then it is a positive advantage to the community. It is true that every such advantage is gained by underselling competitors and driving small capitalists from the market; but that, too, is an economic advantage. To understand this it is necessary to remember that there are two kinds of wealth, consumable wealth, and productive wealth or capital. The former is wholly devoted to the direct gratification of personal and social wants, while the latter serves no other purpose than that of aiding in the production of more wealth. The sole function of capital is that of a tool. As tools are of no advantage either to their owners or to the public except as they are successfully used in producing wealth, it follows that the only economic and social interest the community can possibly have in either the diffusion or concentration of capital (tools) is that it shall be so employed as to produce consumable wealth most cheaply.

The income of the capitalist class consists of profits, which the community is not interested either in sustaining or increasing. On the contrary, it is always interested in minimizing the proportion of the product which goes to the capitalist as profits, and maximizing that which goes to the community in low prices and high wages. Clearly, therefore, society can have no interest in sustaining the small capitalist unless he can produce wealth as cheaply as the large one; any more than a manufacturer has in sustaining a lazy, incompetent workman in preference to an efficient one. The public could better afford to pension small

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manufacturers as paupers than to pay the high prices resulting inevitably from the inferior methods their limited capital can employ. Nor is this necessarily a disadvantage to the discharged capitalist, because the large, and hence successful, capitalist can give him employment as a manager or overseer at a higher salary than he could obtain as an isolated small manufacturer; and this is what has occurred wherever industrial integration has taken place on any considerable scale. Strictly speaking, the concentration of capital does not drive small capitalists out of business, but simply integrates them into a larger and more complex system of production, in which they are enabled to produce wealth more cheaply for the community and obtain a larger income for themselves. Consequently, the economic absorption of small capitalists by large ones, instead of being a public evil, is a public advantage, because it can only take place when it serves the community better.

Second: The next charge is that the concentration of capital tends to destroy competition. This is a serious mistake. When the products of the small factory undersold those of the hand-loom and drove the hand-loom weaver out of the market, it did not destroy competition. It is true, competition ceased between the factory and the hand-loom weaver, but it immediately commenced between small manufacturers. Hence, instead of destroying competition, it only changed the plane upon which the competition took place. Again, when competition began between small manufacturers, it was much fiercer than ever it had been between hand-loom weavers. The same was true when small manufacturers began to integrate into corporations. The products of the corporation undersold those of the small manufacturer, and practically drove him from the market; but that did not destroy competition, for, when the small manufacturer ceased to compete with the large corporation, another corporation took his place, and competition was raised to a still higher plane; that is, to a plane between stronger contestants, in which the competition was necessarily more severe. What was true of the hand-loom weaver and small manufacturer, and the small manufacturer and the corporation, is now true of trusts.

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By the use of large capital, improved machinery and better facilities the trust can and does undersell the corporation; but that is not destroying competition. It is simply making trusts necessary in all large industries, and thus again raising the plane of competition, from the domain of corporations to that of trusts.[1] The competition between trusts naturally tends to reduce the profits to a closer margin than did the competition between corporations, for the reason that the larger the business transacted, the smaller the percentage of profit necessary to its success. Thus, instead of the concentration of capital tending to destroy competition and encourage large profits, the reverse is true. It tends to raise the plane and increase the intensity of competition, and minimize the margin of profits.

Third: The third complaint is that the concentration of capital tends to increase prices. This is the most important charge of all. Whatever the advantage derived from the concentration of capital in productive industry may be, if it tends to increase the prices of commodities, that would be an evil sufficient to warrant its arrest; and as the whole history of industrial progress has been in the direction of the concentration of capital into larger and larger establishments, if the charge be true, it would prove that the industrial development of modern civilization is on the wrong track, and nothing short of revolution could redeem us from the evil effects thereof.

Fortunately for civilization, all the facts of industrial history point the other way. It is a well-established principle, both in economics and practical business, that capital is most effective in producing consumable wealth where it is most concentrated. The modern factory and railroad systems, which have done so much to cheapen wealth and increase the comfort and convenience of society during the present century, would have been absolutely impossible upon any other principle than that of colossal aggregation of capital.

[1] Witness the organizations of the sugar warehouse men, the tin and copper manufacturers, the millers, the farmers and fruit growers, all of which have been made necessary by the severe competition caused by the large concerns which can do the business at the minimum cost.

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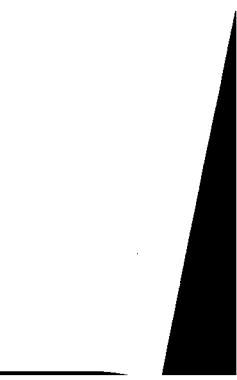

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That the concentration of capital into large enterprises is an economic and social advantage, tending to increase production, to lower prices, and to raise wages, is demonstrated in the history of every progressive country and every successful manufacturing establishment in the world. In short, the use of large capital, the specialization of labor, and the concentration of productive power are the infallible evidence, not only that wealth is being more economically and abundantly produced, but that the community in general, and the wage-receivers in particular, are obtaining a constantly increasing proportion of the product. Large establishments sustain the same economic relation to small ones that steam and electricity sustain to hand labor. The railroad supplanted the pack-horse and stage coach for no other reason than that it served the community better. When the small farm or factory is driven from the field by the larger one, it is always because the latter does the work better and cheaper than the former. As an illustration of this principle, let us take the progress in the cotton industry in the United States since 1830. In that industry, according to the United States census for 1880,[1] the investment of capital, the number of establishments, amount and price of product, and wages paid in 1830 and 1880 were as follows:

	1830.	1880.
Number of establishments	801	756
Aggregate capital invested	$40,612,984	$208,280,346
Number of lbs. cloth produced	59,514,926	607,264,241
Number of persons employed	62,208	172,544
Number of spindles employed	1,246,703	10,653,435
Amount of capital to establishment	$50,702,	$275,503
Ratio of lbs. produced to capital	1.4 to $1.00	2.4 to $1.00
Ratio of capital to persons employed	$652.85 to 1	$1207.17 to 1
Ratio of spindles to persons employed	22 to 1	62 to 1
Ratio of capital to spindles employed	$32.58 to 1	$19.55 to 1
Ratio of lbs. produced to persons employed,	950.7 to 1	3519.5 to 1
Ratio of lbs. produced to spindles	47.6 to 1	57.0 to 1
Annual consumption of lbs. of cotton cloth per capita	5.90	13.91

[1] Vol. II, Statistics of Manufactures, pp. 531 to 547.

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	1830.	1880.
Price of cotton cloth per yard	17 cts.	7 cts.
Operative's wages per week [1]	$2.55	$5.40

It will thus be seen that in the 756 large establishments in 1880, in which the aggregate capital invested was five times as great as that in the 801 small establishments in 1830, the capital invested per spindle was one-third less, the number of spindles operated by each laborer nearly three times as large, the product per spindle one-fourth greater, the product per dollar invested twice as large, the price of the cotton cloth nearly sixty per cent less, the consumption per capita of the population over one hundred per cent greater, and wages more than double. What is true of this industry, is true of all industries where the concentration of capital has taken place.

It may be urged that the cotton industry has never been under the control of a trust or syndicate, and that the evil effects of concentration do not begin until the trust period is reached. Among the most formidable concentrations of capital which have come under the unfortunate name of trusts or syndicates are those devoted to railroading, telegraphing, and the production of petroleum. There are others of similar proportions, but these are the monster evils most to be feared in this country. And, furthermore, these trusts have been in existence the longest, and the true economic tendency of such organizations will therefore be most clearly indicated in their history. What are the facts in relation to these?

We will take, first, petroleum. Not only is the production of petroleum in the hands of a trust, but it is probably the largest trust in the world. The worst of these evils, therefore, may be expected to be found in the history of the Standard Oil company; and if there are any special advantages in trusts, we may expect to find there the best results also.

There are, now, several economic advantages in connection

[1] These are women's wages. I have taken the wages of women because there were not men enough employed as cotton operatives in 1830 to warrant a fair comparison; but to the extent that they were so employed their wages have risen in a similar ratio to those of women.

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with these institutions that are not to be found in individual corporations. When corporations were isolated they were in competition with each other, not only in the selling market, but in the productive process also, and each one who discovered an improvement in the manufacture naturally took special pains to keep it from all competitors. Under trust companies this is reversed. No sooner is an improvement found by any one corporation, than it is, from common interest, applied to all; hence the economy which was previously confined to a single corporation now becomes a part of the process of the whole product in the market, — at least, so far as the trust is concerned. Again, when corporations combine they are enabled to manufacture all their own supplies on the largest possible scale, and are thereby enabled to employ the most improved method of production in every department. This is exactly what has been accomplished by trusts. For example, before the organization of the Standard Oil company in 1872, oil had to be transported from the wells to the market by the railroads in small quantities, in barrels, tanks, *etc.* After the organization of that company, these various methods were superseded by one general pipe line, which takes the oil directly from the well to the market. There are two such lines reaching New York, with a capacity of 25,000 barrels per day. There is also one such line to Philadelphia, one to Baltimore, another to Buffalo, another to Cleveland, and another to Pittsburg, and one is now being laid to Chicago. This was an undertaking absolutely impracticable for any of the smaller corporations. The result is a saving of 66⅔ per cent on the cost of transportation alone. In 1872 it cost $1.50 to transport a barrel of oil to New York; to-day it costs only 50 cents. In 1872, barrels cost $2.35 each; to-day the Standard Oil trust manufactures them for its own use at $1.25 each, a reduction of 47 per cent, or a saving of nearly $4,000,000 a year. In the cost of the manufacture of tin cans, a saving of 50 per cent has been made, the price having been reduced from 30 to 15 cents per can since 1874. As this company uses about 30,000,000 tin cans a year, that makes a saving of over $4,500,000 annually. The same is true of wooden cases, which in 1874 cost 20 cents

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each. The company now manufactures them for itself at a cost of 13 cents each, being an annual saving of about $1,250,000.

Who was benefited by all this economy? is the question that naturally arises in this connection. Did it go into the pockets of the Standard Oil company as profits, or did it accrue to the community in the reduced price of oil? That question can best be answered by the facts, as shown in the following table:[1]

Year.	Shipments from wells. Bbl.	Stock of crude oil on hand. Bbl.	Price of crude oil per gallon at wells.	Price per gallon of refined oil for export.
1871	5,667,891	568,858	10.52 cts.	24.24 cts.
1872	5,899,942	1,174,000	9.43	23.75
1873	9,499,775	1,625,157	4.12	18.21
1874	8,821,500	3,705,639	2.81	13.09
1875	8,924,938	2,751,758	2.96	12.99
1876	9,583,949	1,926,735	5.99	19.12
1877	12,496,644	2,857,098	5.68	15.92
1878	13,750,090	4,307,590	2.76	10.87
1879	16,226,586	8,094,496	2.09	8.08
1880	15,839,020	16,606,344	2.24	9.12
1881	19,340,021	25,333,411	2.30	8.05
1882	22,094,209	34,335,174	1.87	7.41
1883	21,967,636	35,715,565	2.52	8.14
1884	24,053,902	36,872,892	1.99	8.28
1885	24,029,424	33,836,939	2.11	7.86
1886	26,332,445	33,395,885	1.69	7.07
1887	26,627,191	28,310,282	1.59	6.75

It will be seen by the above that from 1871, the year before the Standard Oil company was organized, to 1878, the year before the pipe line was laid, the price of refined oil fell 13.37 cents per gallon. From the laying of the pipe line to the organization of the trust in 1881 it fell 2.82 cents per gallon, and from the organization of the trust to 1887 it fell 1.30 cents per gallon. Thus, through the economies introduced into the production

[1] See New York Produce-Exchange Reports, 1873–4, p. 483; 1875–6, p. 445; 1876–7, p. 405; 1882, p. 773. Also New York Chamber of Commerce Reports for 1869–70, p. 45; 1871–2, p. 54; 1875–6, p. 50; 1878–9, p. 98; 1882–3, p. 67; 1886–7, p. 65; 1887–8, p. 73.

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and transportation of petroleum since 1871, the price of refined oil has been reduced 17.49 cents per gallon, or 72 per cent, being a saving to the consumers of the 998,953,011 gallons of refined oil last year alone of $174,716,881.

It may be said that this great fall in the price is partly the result of the fall in the price of crude oil. That is true, but much of this fall is also due to the improved facilities applied at the wells by this company. But were it true that this reduction is all attributable to causes over which the Standard Oil trust has no control, which is absurd, that cannot be said of the fall in the price of refined oil in excess of that of the crude. It will be seen from the table quoted above, that since 1871 the price of crude oil has fallen 8.93 cents per gallon, leaving a net fall in the price of refined oil, over and above that of the crude, of 8.56 cents per gallon, or 1.81 cents per gallon more than the total price now paid for it. This reduction in price is due exclusively to the improved methods introduced into the various processes of refining and transporting oil. If the price of refined oil had only fallen in the same ratio as that of crude, it would to-day cost the consumer 15.30 cents per gallon instead of 6.75 cents, the price at which it was sold in 1887. It will thus be seen that, giving the opposition the full benefit of all the doubts, the consumers of refined oil in 1887 had a clear gain, of $85,410,482 as the result of the efforts of the Standard Oil company; and still we are told that trusts tend to advance prices to the consumer.

Another trust company that has been singled out for censure is the one engaged in the manufacture of cotton-seed oil. So strong is the feeling against trusts, that an effort has recently been made to impose a tax upon the product of this company, not to make it reduce, but to force it to increase the price of its product, in order that hog fat manufacturers might have a special advantage. Notwithstanding this opposition, the price of cotton-seed oil has moved along with the economic improvement in its production introduced by the trust. In 1878 the average price of standard summer yellow oil was 47.94 cents per gallon. In 1883, the year before the organization of the trust,

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it had only fallen to 47.08 cents per gallon. In 1887, four years after the organization of the trust, it had fallen to 38.83 cents per gallon. In other words, during these four years the price of cotton-seed oil fell more than eight times as much as it did during the five years before the trust was formed.[1]

What is true of petroleum and cotton-seed oil, is also true of sugar and other products. Although the sugar trust has not been organized long enough to give any specific results, the concentration of capital in that industry has been steadily increasing for years, and the prices show a commensurate tendency downwards. In 1880, the price of "Grocers' Standard A White Sugar" was $9.48½ per barrel. It has continued to fall every year since that date, until in 1887 it was only $5.66 per barrel, and other grades of sugar and molasses have fallen in a similar and some in even a greater ratio.[2]

Another of the large organizations against which the hardest things are said, is the railroad syndicate. We hear a great deal about railroad monopolies and their robbery of the public by the high rates made possible by these colossal combinations. An examination of the freight tariffs on the trunk lines shows the same general reduction in prices that we have seen in the case of the Standard Oil and other trusts. The average rates for sending a hundred pounds of freight from New York to Chicago in 1862 and in 1888 were as follows, showing a reduction of 51 per cent:

	1862.	1888.
First class	$1.63	$0.75
Second class	1.32	.65
Third class	1.05	.50
Fourth class	.66	.35

It may be added that the rates for the second and third classes have each been advanced five cents per hundred pounds, through the beneficial influence of the interstate commerce law.

[1] These facts are taken from the prices quoted in the market reports of the *New York Daily Commercial Bulletin* on the first of every month from January, 1878, to December, 1887.

[2] See New York Chamber of Commerce Reports for 1880–1, p. 17; 1882–3, p. 18; 1883–4, p. 18; 1884–5, p. 18; 1885–6, p. 18; 1886–7, p. 18; 1887–8, p. 18.

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Another formidable organization that has afforded a theme for considerable moralizing is that of the telegraph system. The Western Union Telegraph company is, perhaps, next to the Standard Oil trust, regarded as the worst monopoly in this country. It is well known that, prior to 1866, our telegraphic service was done through a host of small local companies. To send a message across the country involved its going through the hands of not less than a half a dozen companies. In 1866, these were integrated into one organization under the name of the Western Union Telegraph company.

Since the concentration of capital in the telegraphic service under this organization, the rates for messages from New York to the large centres throughout the country have been reduced 85 per cent, as is shown by the following table:

Rates for sending ten words from New York:—

	1866.	1888.		1866.	1888.
To Chicago . .	$2.20	$0.40	To Minneapolis .	$2.10	$0.60
" St. Louis . .	2.55	.40	" Buffalo . . .	.75	.25
" St. Paul . .	2.25	.50	" Wash'gton, D.C.,	.75	.25
" Cincinnati . .	1.99	.40	" San Francisco .	7.45	1.00
" New Orleans .	3.25	.60	" Oregon . . .	10.20	1.00
" Galveston . .	5.50	.75	" W. Territory . .	12.00	1.00

Moreover, in 1868, when this company sent only 6,404,595 messages, it cost the company, on an average, 63.4 cents per message; and in order to make a profit on the capital invested, the average price charged to the community was $1.047 per message, leaving 41.3 cents profit per message. In 1887, when the company sent 47,394,530 messages, the average cost per message was 23 cents; and the average toll to the community was reduced to 30.4 cents per message, leaving only 7.4 cents profit per message. It will thus be seen that during the twenty years of this "monopoly," the average cost of messages to the community, to all points, has been reduced 74.4 cents per message, or over 70 per cent; and that the profits have been reduced 33 cents per message. In other words, the total cost of the service to the community to-day is 10.9 cents per message

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less than the profits alone were before the organization of this company.

It may perhaps be said, that, although these trusts have constantly resulted in reducing prices, should the government run the business, a still greater saving would be accomplished. This idea has been so extensively and favorably received that the demand for government ownership of railroads and telegraphs has become one of the stock resolutions in all industrial reform movements, and the proposition for the government to take possession of the telegraphs is actually before Congress in a bill introduced in the Senate.

There are many reasons why this, in the nature of things, would not be an improvement. Arbitrary monopoly is the natural harbinger of irresponsibility, incompetency and waste, and hence naturally tends to give inferior products at maximum prices. While this is true of all artificial monopoly, it is especially true of government monopoly. The head of a government enterprise, having no interest in the profit, has no necessary incentive for developing improved methods of service. On the contrary, he has a direct interest in keeping the number of employees at the maximum, because, by the disposition of industrial favors, he can command political allegiance, which is the power he chiefly relies upon to retain his position. And this tendency is strongest under democratic institutions, because it is there that the political potency of the laborer is the greatest. Under a system where political influence, rather than economic efficiency, is thus the condition of employment, and where there is little responsibility and no redress for the injury and loss caused by delay and blunders through incapacity, poor, or at best mediocre service must necessarily result.

Nor is this mere speculation, for extensive experiments in government telegraphy have already been tried, and the facts speak for themselves. In all European countries the telegraphic service is in the hands of the state. We therefore have ample opportunities for testing the matter by experience. It should be noted here, that under private enterprise in this country, the company is responsible for losses caused by the failure or delay

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in delivery, while no such protection is afforded to the interest of the citizens under any existing system of state telegraphy. As under our postal system, the government is entirely irresponsible, at least to the individual with whom it is doing business. If the citizen is utterly ruined by the inefficiency of the department, he has absolutely no redress; he pays his money and takes all the risk.

The most efficient system of state telegraphy in the world, and the one which gives the lowest rates of toll to the public, is that of Great Britain. England possesses exceptionally favorable conditions for giving cheap telegraph service. In many important respects her advantages are superior to ours. She has a limited, thickly settled, well-cleared country, while we have an extensive, sparsely settled, ill-cleared country to operate in. The extreme distance between terminal stations in England does not exceed 600 miles, with (in 1887) 29,895 miles of line, carrying 173,539 miles of wire and cable, with 6500 offices, and transmitting about 50,000,000 messages per annum. In this country the extreme distance between terminal stations is nearly 5000 miles, with 176,000 miles of line, carrying 630,000 miles of wire and cable, and maintaining 17,000 offices to do the business of 55,000,000 messages.

With such natural advantages over this country, and with labor one-fourth lower, if there is any efficacy in government ownership, Great Britian ought to be able to serve the public vastly cheaper than private enterprise in this country can possibly do. Is such the case? Let the facts answer.

The rate of tolls in England since the reduction two years ago, is 12 cents for twelve words, including date, address and signature. As the date, address and signature will average from ten to fourteen words, it will cost from 23 cents to 25 cents to send a ten-word despatch, which is but a fraction less than the rate in this country. The press despatches are transmitted much more cheaply here than in England. But even this seeming cheapness in the English service is unreal, for the rate of toll does not represent the price the public actually paid for it; because, with the exception of the first two years of government

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ownership, the postal telegraph has never paid expenses, as is shown by the following table, the deficiency of course having to be made up out of taxes:

Postal Telegraph Deficiencies in England.[1]

1872	$771,036.82	1880	$143,563.78
1873	854,335.12	1881	4,772.94
1874	997,910.50	1882	540,166.04
1875–76	919,842.00	1883	682,672.96
1877	898,843.42	1884	1,661,348.22
1878	907,518.72	1885	1,741,228.50
1879	547,774.18	1886	2,255,232.00

It will be seen from this table that the deficiency in the telegraphic service of Great Britain has averaged nearly a million dollars a year ever since state ownership began, and in 1886, the first full year of the present rate, the deficit was over two and a quarter million dollars, to which must be further added about one and a half million dollars for interest on the bonds given for the plant when the government purchased the telegraph in 1870. Thus, in addition to what is directly paid for the service by the consumer, about $7\frac{1}{2}$ cents per message is paid indirectly in taxes, making a total of over 30 cents per message of ten words; while the cost in this country is only 20 cents for ten words in large cities and 25 cents for ten words for distances of four or five hundred miles, the average for all the messages, both long and short, being only 30.4 cents per message.

From these facts it will be seen that with natural disadvantages in this country which make it necessary to cover eight times as much distance between the terminal stations, to have three times as many miles of line, three and a half times as many miles of wire and cable, and to maintain two and a half times as many offices, and with wages much higher, private enterprise can render about the same amount of telegraphic service as cheaply and with more efficiency and despatch than is done by state ownership in England. And it may be added, that those who do the business here make a living profit, while

[1] Parliamentary Reports on Postal Telegraph, 1886–87.

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there they do it for nothing, or run into debt. The proposition to substitute state telegraphy for private enterprise in this country, in the face of such facts, is surely entitled to be designated by some other name than statesmanship.

Those who advocate governmental control of large industries would probably refer us to the management of the post office, which is always cited as the model experiment in collective ownership. We are pointed to the fact that it formerly cost twenty cents to carry a letter across the country while it now costs only two cents, as an evidence of the economic success of the state control. There are few facts which the public accept more implicitly and regard as more conclusive than these; yet there are few more delusive and misleading. It is true that we can now send a letter three thousand miles for two cents, but if we examine the matter a little closer, we shall see that this is not due to anything the government has done. All the government does in the postal service, is to collect, assort, stamp and bag outgoing, and deliver incoming letters; give out and receive money orders; and render an account of the business done. No improved methods have been introduced during the last twenty-five years in that part of the postal system which the government controls. Letters are stamped by hand, and delivered and collected by individual messengers, just as they were fifty years ago. All the economy in the postal service has come from the improved methods of transporting the mail, and this, it should be remembered, is all done by private enterprise. From the moment the letter-bag leaves the door of the post-office it enters the hands of private enterprise. It is the great railroads, steamship companies, *etc.*, and not the government, that have made it possible for letters to go three thousand miles for two cents. Indeed, it is more than probable that had the postal system been under the control of private enterprise, instead of that of the state (managed by mediocre politicians), letters would ere this have been stamped by machinery and collected from street boxes by electricity, and that other improvements would have been introduced which would have

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sufficiently economized labor to render one-cent postage possible without running into debt.

There is still another class of objectors to the concentration of capital in the form of trusts. These are sufficiently careful and well informed of the facts to know that trusts have not, as is commonly asserted, yet shown any tendency to increase prices. Their fears, however, all relate to what may happen in the future, when the trusts, having organized in all branches of industry, become masters of the situation. It is not, according to them, until that point of industrial concentration is reached, that the evils of trusts will be upon us, but when that time comes it will be too late to call a halt. The community will then be completely at the mercy of the colossal capitalists, and we may expect not only a rise in the price of the necessaries of life, but all the kindred evils monoply implies.

This statement has a more plausible seeming than those which fly in the face of all known facts, but upon examination it will, I think, be found to be scarcely less erroneous. If the trusts control all the productive processes, it is asked, what is to prevent them from putting prices at whatever height they choose? I answer, that which is to them the most important of all considerations, namely, "*self-interest.*" If it could be shown that their interest would be promoted by raising prices, I freely confess that there would be little hope of the fact being otherwise. It should always be remembered, that capital is one of the most sensitive things in the world; — it has been well said that nothing is so cowardly as a million dollars, except two million dollars. Capital always shrinks at the sight of losses, and it will run almost any risk for probable profits. Knowing this as no others do, the monopolists, so called, see very clearly that if they put their prices so high that the margin of profit is abnormal, capital will at once leave other industries and rush into theirs. Capital is ever waiting for just such opportunities. It may be said that if new capital comes into the business they will buy it up. But that takes money, and a million dollars invested in buying up a competitor might, with much more safety, be invested in reducing prices; because a new

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competitor may prove too strong to be bought up, in which case the monopolists themselves may be driven from the field or have their profits reduced to the lowest point. They have therefore a direct interest in keeping prices at least sufficiently low not to invite the organization of counter enterprises which may destroy their existing profits. If the gates for the admission of new competitive capital are always open, the economic effect is substantially the same as if the new competitor were already there; the fact that he *may come* any day has essentially the same effect as if he *had come*, because to *keep him out* requires the same kind of influence that would be necessary to *drive him out*. And as the latter always involves greater risks than the former, on the principle of self-interest the former is most likely to be adopted.[1] There is really little to fear, in this line, so long as arbitrary barriers are kept out of the way, because in the absence of legal restrictions the active influence of the potential competitor is ever present.

Fourth: The next charge against trusts is that, through their immense wealth, they are obtaining an increasing control over the government, and are thereby tending to become not only industrial monopolists, but political dictators also, the latter being the natural consequence of the former. This charge, I think, upon investigation, will also prove to be unfounded. Notwithstanding the wholesale complaints that legislation is all in their interest, the statute books of the various states show no evidence of this fact. Instead of laws being enacted to grant special favors to these corporations, the books bristle with enactments directed against them. It is true that they have lobbyists, and perhaps spend large sums of money during the legislative sessions; but any one who will investigate the matter will find that it is almost invariably to defeat legislation directed against them, and not to enact new laws in their favor. They need no legislation in their favor. They are strong enough, by virtue of their concentrated capital and improved

[1] This is clearly shown in the history of the Standard Oil company. During the last ten years this company has had practically no competitor. Still the price of oil has steadily tended downwards.

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methods of production, to hold their place in the industrial world.

Instead of growing in political power, they are constantly becoming politically ostracized, as is shown by the increasing unpopularity of the presidents and other prominent officials of trust companies. Fifty years ago it would have been regarded as a favor by the community for a rich manufacturer to accept any position. Just in proportion as this industrial concentration and specialization has developed, the political attitude of the community has changed towards capitalistic magnates, until to-day the president of the Standard Oil company, or of the Western Union Telegraph company, or of a railroad syndicate, whatever his personal qualifications, could hardly be elected as a member of a board of aldermen. Nor is there anything unjust in this attitude. These men have not developed the qualities of statesmanship. They have developed simply the capacity of industrial managers, and as such, in the specialization of social and economic forces, they naturally gravitate to the field of operation where they are experts. Hence, in proportion as they become industrial specialists, they recede as political leaders. This is also shown by the fact that if they want to affect legislation they are compelled to do it indirectly, because to be known is to be defeated.

But those who take this pessimistic view, when asked for facts, failing to find them in modern experience, generally point us to ancient Rome, and bid us take warning of her fate. They, with considerable eloquence and pathos, remind us that when the wealth of Rome began to be concentrated into a few hands, the people were oppressed, political corruption and private immorality ran rampant, and intellectual, political and national decay set in, which culminated with the destruction of her civilization. To say that because the concentration of wealth led to political and national degeneracy in Rome in the fourth century, the concentration of *capital* will produce the same results in the nineteenth century, is illogical to the last degree. This conclusion is based upon the very common assumption that all concentration of wealth tends to impoverish the masses. That

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is a fundamental error, which arises from the failure to recognize the distinction between consumable wealth and productive wealth.

It is true that the concentration of consumable wealth in the hands of one class lessens the amount available for the others. But this is not true of the concentration of productive wealth (capital), because, as I have already shown, capital fills no other function than that of a tool; hence no class is the richer for owning capital, except as they obtain the consumable wealth that it produces. Under Rome it was the consumable and not the productive wealth that was concentrated. It is notorious that nothing was held in more contempt in the Roman imperial period than industry. It is said that Augustus pronounced the sentence of death upon Senator Ovinius for "having so degraded himself as to engage in manufacture." Rome was essentially a military and not an industrial state. She lived by plunder rather than production, and her wealth was distributed by authority rather than economic law. Hence the history of Rome, instead of illustrating the necessary consequences of present industrial tendencies, shows, rather, what may naturally be expected from the arbitrary manipulation of industrial affairs.

Since capital is of no use to any one except as it produces enjoyable commodities, and since the capitalist can obtain no enjoyable commodities as the result of concentrated capital except as he can sell its products, it follows that capital can only be advantageous to the *capitalist* when its products are generally and liberally consumed by the community, and, consequently, the concentration of capital is economically possible only in proportion as the consumable wealth it produces is generally distributed. For this reason the arbitrary concentration of consumable wealth in Rome made the concentration of productive wealth impossible, and, conversely, the natural concentration of productive wealth to-day makes the concentration of consumable wealth impossible. It is of the very essence of economic law that consumable wealth is most widely distributed in proportion as productive wealth (capital) is concentrated. Thus by

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the same economic law that the social and political degradation of the masses was increased by the concentration of consumable wealth under Rome, their material prosperity and political independence are promoted by the concentration of productive wealth under modern industrial institutions.

Manifestly, therefore, the charge that the concentration of capital in the form of trusts and syndicates, necessarily tends to produce monopoly (in the obnoxious sense), destroy competition, increase prices, oppress labor, or to put the government into the hands of an industrial oligarchy, is without any real foundation in fact, or justification in reason. On the contrary, these institutions, instead of being the evidence of industrial abnormity and economic disease, are the natural consequence of modern industrial differentiation, and in their nature are economically wholesome, and politically and socially harmless.

In taking this view of the economic and social aspects of trusts, I do not assume the moral sponsorship of all that is done in their name and behalf. I am not unmindful of the fact that many evils have grown up with the development of these organizations, which demand the most serious consideration and vigorous treatment. But I insist that this is not an inseparable part of these institutions, and hence that it is not necessary to check their economic development in order to suppress the moral and social evils that have become associated with them. The corruption of the lobby and the coercion of competitors are no more necessary to trusts than venal voters are to democratic institutions, than mercenary decisions are to the jury system, than blatant demagogy is to free speech, or than superficial, sensational and fawning journalism is to a free press. It is a characteristic feature of all social development that the advent of new and more complex phenomena always creates the possibility of new evils. And it is only to the extent that these evils are eliminated without impairing the good, that any real progress is finally assured. To promote this eliminating process is the function of true statesmanship. In order to do this with any appreciable success we must learn to recognize the important, but generally ignored fact that all

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social, political and moral institutions finally rest upon and are adjusted to and determined by the character of the great mass of the community. It is a well established fact that business immorality and political chicanery are the most general where the social, intellectual and moral character of the masses is the lowest. Hence we always find the habitual misrepresentation of the quality, quantity and price of merchandise, and the systematic packing of caucuses and bribing or coercion of voters, most prevalent among the poorest and most ignorant classes.

Therefore, if we want to improve the character of Congressmen we must elevate that of their constituents, and for the same reason, in order to elevate and purify the tone of the press we must improve that of the readers. The only way to prevent the capitalists from corrupting legislation in the lobbies is to increase the integrity of the caucus. Those who buy votes may always be expected to sell legislation. As the evils associated with trusts are mainly ethical in their nature, their elimination should not be sought in any arbitrary limitation of trusts as industrial institutions,[1] but it should be sought in the direction of a more perfect administration of the criminal law and in increasing the influences which tend to improve the social condition, and develop the intellectual and moral character of the great mass of the people, who constitute the only power that can make such evils impossible. It must not be inferred, however, that the economic phase of trusts and similar organizations is necessarily outside the pale of state action. But if the community is to secure the best economic results from the use of capital and obtain the maximum production at lowest prices, the state should promote rather than restrict the free movement and safe concentration of capital in productive enterprise. One

[1] The present tendency of legislation is strongly in that direction. Since writing the above I have received the full text of a bill recently introduced into Congress proposing to levy a tax of 40 per cent on the products of trusts. This measure, which is characteristic of all the proposed legislation upon the subject, is essentially uneconomic in character. Instead of tending to eliminate the bad features of trusts without impairing the good, it would produce the opposite effect. If it did not make the development of large enterprises impossible it would destroy their economic advantages by making their products 40 per cent dearer to the public.

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of the ways in which the state can render efficient service in this regard, without interfering in any way with the freedom of capital, would be to furnish frequent, reliable statistics as to the cost of production, including that of raw material, wages and transportation, and also the selling price of the product in large industries. With such statistics, scientifically collected and authoritatively presented, whenever abnormal profits existed in any industry, the fact would be generally known; and idle and less remunerative capital would at once move in that direction. By this means the mobility and consequently the competitive influence of capital would be greatly increased, and the full benefits of large enterprises and improved methods of production would be secured to the community by the necessarily minimized prices and profits.

GEORGE GUNTON.

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CONTROL OF IMMIGRATION. III.

The Question of Principle.

IT has been shown in previous papers[1] that immigration to the United States is assuming a character that may well make us consider means for restricting or controlling it. Before treating of the practical administrative measures to this end, it will be interesting to discuss the principle of political science with which we shall have to do in any such regulation or control.

Freedom of migration is no natural, inherent right of the individual. It is merely an historical right of very recent origin and not yet fully recognized in all countries. In all stages of civilization previous to the nineteenth century, the right of a man to leave his native country, or of a stranger to settle in another country, had been denied. In the middle ages the right of leaving one's country was often dependent on the payment of a fine, called *Abzugsrecht*.[2] Military considerations, or the fear of losing skilled artisans who would carry the secrets of the trade to foreign countries also led to prohibitions of emigration. The English Act of Settlement did not hesitate to prohibit migration from parish to parish in the administration of the poor law. So also with immigration, — the jealousy of foreigners caused them to be looked upon with dislike. Sometimes they lost their freedom when they entered the strange air; sometimes they were obliged to pay a heavy fine for the right of settling; often they received only partial privileges.

The spirit of individualism developed by the French revolution has done away with most of these restrictions. The Malthusian fear of overpopulation contributed to the willingness of the countries of Europe to allow their subjects freedom to go if

[1] POLITICAL SCIENCE QUARTERLY, March and June, 1888.
[2] Wagner, Politischeoekonomie I, (1st ed.) S. 410.

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they so chose; while the efforts of new countries, like the United States, have been on the side of gaining for the individual liberty to expatriate himself and to take up a new citizenship in the country of his choice. The military consideration is about the only one that puts any restriction on emigration at the present time. On the other hand, the countries receiving the immigrants have been so glad to get them that they have put no hindrance in the way of their coming, so that immigration has been made practically free.

All this, however, does not conceal the fact that these are both merely historical rights, the product of circumstances, the result of expediency. The state that conferred the liberty may also withdraw it. The state that feels a loss of strength by emigration, may forbid its inhabitants leaving the country. The state that suffers injury from immigration, may put restrictions on persons coming to its shores, — may keep them out altogether if it likes. The individual has no rights at all in the premises. Although he may possibly elude the watchfulness of the government that is trying to detain him, he cannot compel another state to receive him. Whatever may be his position towards his home government, as to the foreign state he has absolutely no rights at all. Any privileges that he may enjoy rest only on the diplomatic agreements with his mother state, or upon the legislation of the receiving state, not on any virtue residing in him. The individual has no right to force himself into a territory where he is not wanted.

It is sometimes held that although freedom of immigration rests on no right of the individual, yet there is a cosmopolitan duty to admit other persons to the soil if they desire to come. A nation, it is said, has a right to the soil only on condition of its making the best use of it, and if it have more land than it really needs it is in duty bound to share it with others. It is upon this basis that the colonization of America by the nations of Europe is theoretically justified. The Indians were the original occupiers and as such they owned the country. But the white men were the more highly civilized and as such they could make better use of the land. What once barely kept a

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few thousand savages from starvation now sustains millions of men in an advanced stage of culture. So it is said that the present inhabitants of the United States have no right to appropriate a country which will support several times their number. Especially is this true in sight of the millions of Europe who could find here comfort which they can never hope to attain there. We have no right to keep these struggling millions out from our fertile fields and broad prairies.

The argument proceeds, it seems to me, from a confusion of ideas. It is the right of the higher civilization to make the lower give way before it. It was this right that the nations of Europe felt was their justification in taking possession of this new country. It would be the same right that would justify Germany and Belgium and Italy in founding colonies in Africa. The higher civilization has a moral right to triumph over the lower, for it is in this way that the world progresses. The duty of every nation to humanity is to see to it that the higher civilization does triumph over the lower. It performs this duty best by preserving its own civilization against the disintegrating forces of barbarism. And when a contingent comes demanding admission, that is of a lower civilization rather than of the higher, its right to be admitted is not so plain. Simply because we have in this country a higher degree of well-being and of comfort than many of the peoples of Europe is no reason why we should share it with them. Our duty to humanity is to maintain the high standard of living which a favorable combination of circumstances has enabled us to establish. It is not possible for us by our own unaided efforts to elevate the masses of Europe to the same standard. We have kept the doors open for a great many years. Millions have availed themselves of the opportunity to share the blessings of this new country. We have carried off their surplus population long enough for them to establish a new standard of living for themselves. They have for the most part failed to do it. Now that they are threatening to drag us down to their level, it is not our place to submit. We must at all hazards maintain our own position and in so doing we are performing the best service both to them and to human-

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ity. One single nation on a high plane of civilization is better than half the world in a state of semi-civilization.

There is, however, a sentimental feeling that is very wide spread, that America has always been the home of the poor, the refuge of the oppressed of all nations. It is felt that we have always held our doors open, and that it is a betrayal of duty to shut them the moment we feel inconvenienced by our missionary work. I conceive that there is a double misunderstanding here. In the first place, our fathers, when they spoke of this country as the "asylum of the oppressed," meant that here should be a refuge from religious and political oppression. They meant that this should be the land of freedom; that all who came here should have liberty of conscience, liberty of opinion, of speech, *etc.* This country has always remained faithful to this proclamation. Religious and political refugees of all nations have flocked hither, and we have not only extended protection to the new comers but we have admitted them to a full share in the government itself. Our fathers did not mean that we were to be an asylum for the paupers, the convicts, and the cripplès of all nations. They did not mean asylum in the modern, limited signification of the word. It is true that many of the early immigrants were indentured as servants and obliged to work out their passage money after they came; but we do not find but that the colonists took the true view of these comers. They received them on account of the dearth of labor, but they would gladly have had better.

In the second place, I think there is liability to grave error in reasoning from the past experience of a country to infallible rules for its guidance in the future. A new country passes through successive stages where its need and its demands are entirely different. At the first settlement the need is for labor, and any kind of labor is acceptable. As the nation advances into the agricultural stage the need still is for labor. So long as unoccupied territory remains, so long as roads are to be built, canals dug, the country opened up, the need still is for labor. As I have said elsewhere, this early civilization controls the character of the settlers. It is in this stage that the saying, which in

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some mouths is the solution of the whole difficulty, namely, that the earth is the great disinfectant and that all we need do is to get these depraved dregs of European civilization on to the land in order to reform them, — it is in this early civilization that this saying is true. The efficacy of the disinfectant, however, lies mainly in this, — that it kills off a large number of those consigned to it. But as a country progresses it loses this capacity of absorbing the lower elements of other civilizations. It no longer possesses the purifying power. It has all it can attend to with its own unfortunates. The rule that applied before is now no longer applicable. It is foolish to attempt to apply it in the United States at the present time. We have lived through our period of rough strength when we could do anything, and must now be more cautious. It is to our credit that for so many years we offered opportunity to the poor and degraded of Europe to better their condition. If we can no longer do it, it is not our fault but simply shows that we are getting to the limit set by nature for that kind of work. We no longer have the facilities and without the facilities it is unwise for us to undertake it. A policy that at one time was all right may at another time be all wrong. The only way then is to abandon it and adopt a new policy fitted for the changed conditions.

These changed conditions are simply, that as civilization advances the struggle for existence between individuals becomes more severe. That has happened in the case of the United States during the last few years. This works in two directions. It brings it about that we no longer offer the advantages to the poorer classes of Europe that we once did. As our civilization more nearly approaches theirs, the gain by emigrating becomes less and less. In fact, proof is not wanting that at the present time many of the immigrants are sorely disappointed after their arrival and wish they had never come. They find that the struggle for existence is almost as severe here as it was at home, and that they labor under many disadvantages such as ignorance of our language, customs and habits of life. It is no kindness to these men to encourage or permit them to come. It is much better that they should stay where they are, sur-

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rounded by those social forces that aid them in their struggle. Most of this immigration is entirely ignorant of the prospect of bettering itself in this country. It is not in any sense an intelligent movement. Its knowledge of this country rests on tradition, or on the information of short-sighted friends, or on the representations of interested persons. The news of a commercial depression does sometimes get back and discourages emigration for the time being. The knowledge of present conditions will not make its way back into the consciousness of the lower classes in Europe for a great many years. But why should we leave this matter to chance or rather to the influence of selfishness? If we know that conditions have changed and that the expectations of the persons will be disappointed, why should not we inform them of it? If we know that the immigrant with no capital and no skill will find it difficult to get employment, will lose his position every time there is dullness in trade, will drift about from place to place earning only a precarious subsistence, why should not we tell him so before he starts on his long journey? No social science teaches that we should leave great masses of men to the guidance of blind impulse or ignorance. If they cannot judge for themselves we must judge for them. If they are being led astray, we must interfere to prevent it.

This change in the condition of things works in a second direction. It brings about increased competition among our own people. Civilization makes the struggle for existence easier for the community at large, but harder for the individual. The community is in less danger of starvation than in the savage state and it has many more of the comforts of life, but the struggle between members of the community to obtain a share of those comforts is more bitter and exhausting. This being so, we have no right to increase the severity of this struggle for our own people by encouraging immigration. We have no right to add to the odds against our own citizens. If free immigration adds to the competition, lowers wages, drags down the standard of life, renders thrift, industry and prudence of no avail, then we have no business to permit it. It is precisely like the old

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administration of the poor law in England where the honest laborer could not earn as much as the pauper received in the poorhouse. If the state owes anything to a citizen, it owes him the chance to exercise the virtues of industry, prudence and thrift. To make the exercise of these virtues of no avail will be to pauperize the whole community. For, as the orthodox economists have so often urged in their defence of private property and free competition, men will not work and deny themselves unless there is some surety that they will reap the fruit of their energy and their self-denial. The constant and increasing competition by immigration is depriving our laboring population of this hope, and we may expect sooner or later to see the result of such a policy. Natural increase of population, inventions of machinery, increased mobility of labor, the domineering position of great corporations as employers of labor, all these things make the struggle of the laboring class to maintain its standard of living severe enough. It is not fair to add to these, competition with the lower civilized labor of Europe.

This brings us to what seems to me the true principle of political science applicable to this case. This is, that the first duty of the state is to its own citizens, to aid them in maintaining the degree of civilization to which they have attained and in improving on the same if opportunity offers. This duty is more important than its duty to humanity at large. Or rather, as remarked before, the state most truly serves humanity by maintaining its own civilization. It is bound, therefore, to guard its citizens against influences that threaten to lower them in civilization.

Applying this principle to the question of immigration, the duty of the state is to watch it closely and, as soon as it threatens to work evil, to interfere and regulate it in some way or other. The thing we have to fear most is the political danger of the infusion of so much alien blood into our social body that we shall lose the capacity and power of self-government, or that the elements of our national life shall become so heterogeneous that we shall cease to have the same political aspirations and ideals and thus be incapable of consistent political progress. A

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second danger is that the immigration of persons, a disproportionate number of whom come from the lower classes of life, will make the burden of public and private charity heavy for us to bear. The third danger, and the one most immediately pressing, is lest the competition of this labor force shall lower the standard of living of our working classes. If any one of these dangers be real, then the state has reason to take action. Even if they are not present at this time, the state has reason to watch and see that they do not become real. The doctrine of protection to home industry has been extensively defended in this country on the ground that it protects the laborer from competition with the pauper labor of Europe. The laborer can justly inquire how he is protected when that same pauper labor is brought to this country and educated and furnished with the necessary tools to enter into direct competition with him. The interests of employers in overstocking the labor market so as to get cheap wages should not weigh one moment against the interests of the laboring class in maintaining a high standard of living. It has been shown over and over again that the highly paid labor is really the cheaper because it is more efficient. No greedy competition between individual employers for the purpose of underselling each other should be allowed to destroy the permanent efficiency of American labor. It is not the majority of the employers of labor who wish to degrade it; it is only the occasional one, but the others are obliged to follow his course in order to encounter his competition. It is the history of the factory laws over again. One employer who used the labor of women and children at starvation wages could compel his competitors to do the same, until the state was obliged to interfere in order to defend the humane employer against the greed of his heartless competitor. It is at this point that the state is often obliged to interfere in the process of natural selection in order to make sure that the really fittest survive.

We must not be misled by any supposed analogy between the increase in the supply of labor and the introduction of labor-saving machinery. The latter often throws labor out of employment and thus brings temporary hardship to some. In the long

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run, however, it cheapens the product to the laborers themselves; and commonly the increased cheapness occasions a greater demand and thus gives increased employment to labor. The inventions of machinery have in the long run benefited the whole community including the laboring class, and the world would be an immense loser if we should return to the old system. The same argument will not apply to the cheapening of product by an increased supply of labor, making wages lower. The price of the product may be lowered, but a permanent loss falls on the laborer in the shape of decreased income, and this results in lowering the standard of living for the whole laboring class. It is this degradation from which the laborers do not recover, and which is the damage to the community. In a generation or perhaps even less time they get accustomed to the lower style of living and lose the remembrance of anything better or the ambition to attain it. The state does an irreparable wrong to the laborer and to itself when it allows this to occur. No increased cheapness of the product to the consumer can compensate for this loss of civilization. No increase in the number of citizens can compensate for the loss in the quality of the same. The 280 million inhabitants of India, or the hordes of China are not to be compared for an instant with the 60 million comfortably fed and clothed and intelligent people of America. We are a great and powerful nation at the present time. We will not increase our greatness by increasing our numbers at the expense of our comfort.[1]

But, some one says, there are our public lands. We can increase our numbers indefinitely and still maintain our standard of comfort. There is no reason why we should stop at sixty millions; we can certainly go on for a long time yet and not only maintain our prosperity but add to it, just as we are more prosperous with sixty millions than we should be if we had only twenty, because a certain labor force is necessary to cultivate the soil and to get the advantages of division of labor. There

[1] The danger to American labor from the immigration of labor with a lower standard of living has been brought out in a spirited way by Pres. Francis A. Walker. Address before the Alumni of Lehigh University, New York, 1887.

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are two answers to this: One is, that the law of diminishing returns will sooner or later apply to our public land, just as it has elsewhere. Whether it applies already or not, is not plain. More than one-half has already been taken into cultivation, and one would suppose it would be naturally the better half that had been so appropriated. As soon as the law does begin to apply, then we shall get less profitable returns for additional applications of labor. Even if we have not reached that point at the present time, why should we hasten a day which comes early enough in the history of any nation?

A second answer is, that up to the present time the public land has been our great safety valve. It has permitted a constant migration from one state in the Union to another. There has always been room for the restless and the energetic; always a chance for the man who has failed in one place to try it again under new conditions. Few people realize how much this has simplified social problems with us. We have laughed at the fear of over-population. When trades became unprofitable, a man could take to agriculture. When the farms in the East were exhausted, a man could take up new land in the West. It is no gain to us to shut off this safety valve. This great domain should perform the same service for future generations that it has already performed for the present. Because we have a valuable heritage, why should we divide it among strangers? Because we have had an easy time, why should we make life severer for our descendants? We should conserve all the advantages of our position, so as to enable them to maintain the same degree of comfort which we have enjoyed. The income should be enjoyed by each generation, but the principal should go down unimpaired. To squander our public lands is like that short-sighted policy of cutting away forests and destroying the fruitfulness of vast tracts of land forever.

The question of principle may be viewed from another standpoint also: — What effect would it have on our diplomatic relations to shut out the citizens of other states? There is every indication that such a course of conduct would not give offence to the nations of Europe. Every state has the power to regu-

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late the question of the kind of people it wishes to have in its territory, just as every state has the power to regulate the political privileges it will confer on those who come to it. The protective system already shuts out the commodities of other nations from our markets, and injures the value of their labor. We recognize the right of a nation thus to protect its home industry if it deems it expedient. The protection of its labor by shutting out the labor of other countries would be but a step further in the same direction. No one disputes our right to forbid aliens holding lands in this country, although the avowed reason of the legislation is fear lest aliens may be gaining too much influence. No one has disputed the constitutionality of our anti-Chinese legislation, and, I think, there is a great and increasing feeling that that was wise legislation. The nations of Europe have acquiesced in our laws restricting the immigration of paupers, criminals and persons unable to support themselves, and contract labor. There has been no voice heard that we had not a perfect right to prescribe what qualifications we pleased for entrance into this country, or exclude what persons we pleased. The right from the side of international law is perfect. In fact, the nations of Europe, with the possible exception of Great Britain, are too much interested in the right of the state to control emigration and immigration to object to our making what precedents we please about it. Most of them see with dislike the emigration from their own territories. To such nations as Germany and Italy, desirous of playing leading rôles in European politics, it seems to weaken their military and industrial power. They would very gladly put an end to it if they had any excuse. To countries like Norway and Sweden it seems to put them still further back into the rank of second-class powers, and they fear lest the land with its harsh climate may be entirely deserted for the fairer regions of the far West. Such countries would gladly see us make emigration from them more difficult, and would co-operate with us. They would gladly see the precedent established to restrict immigration. England has already had an official inquiry in regard to the competition of foreigners in the trades of London, and Lord

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Salisbury has expressed no doubt as to the power of Parliament to legislate about the matter, although he deems it inexpedient at the present time. The French complain of the influx of foreign workmen, especially of Italians, and public contracts are given out under the proviso that the work shall be done by French workmen. There are also some cases of foreigners settling on the frontier, as the Russians in the Baltic and Polish provinces of Prussia, where the state would be glad to interfere from political considerations.

Administrative Measures.

We come now to the question of the proper administrative measures to be taken by the United States if we desire to restrict or control immigration. I do not believe in any wholesale restrictions or prohibitions of immigration. They would be difficult to enforce and not fair to the parties interested in the present arrangements. It would be impossible, for instance, to prevent the people who are already on this side of the water sending for their families and friends to join them. It would be difficult to prohibit immigration without impairing the modern freedom of travel which is so important to our commercial interests. There are cases where it is still advantageous to have additional labor force coming to us. Vast interests are bound up in the business of transportation, which should not be destroyed without due notice. Our measures should be such as will be practicable to enforce, as shall free us from the chief evils which unlimited immigration brings, and such as shall have the effect of gradually discouraging the movement so that it may of itself come down to reasonable proportions. It is easy to suggest measures of this sort. Whether they will be efficacious or not, we shall be able to tell only by actual experience.

The first and most obvious of all these measures is the rigid enforcement of the present laws against the landing of paupers, criminals and persons unable to support themselves. That these laws are not enforced is a scandal to the community. There is no question in regard to the entire undesirability of

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such persons for us. There is no principle of political science which permits a community to unload its unfortunates on another community, or which compels that second community to receive them. The rigid enforcement of such laws would teach the local administrations in Europe that it is no use directly or indirectly to help such people to come to this country. It would make the steamship companies careful not to bring them in their ships nor to receive them from charitable societies for transportation. The formation of societies for the purpose of furnishing state aid or any other kind of aid to persons too poor to emigrate, should be made a subject of diplomatic negotiations, and the activity of such societies, as well as that of the foreign state itself, in this line of work should be protested against. The sooner we take up a determined position in this matter the better it will be for all parties concerned.

The second measure should be the enforcement of the law against the importation of contract labor. This law, although in some of its applications it has seemed harsh or even ridiculous, has at the bottom a perfectly just and right idea. This is, that the importation of labor under contract always has the tendency to degenerate into a sort of cooly business, a traffic in human flesh and blood. The flow of labor into this country is sufficiently great now without needing any artificial stimulus. What we need to do is not to encourage it, but to discourage it. At any rate, it is not safe to put such a business into the hands of private parties who pursue it solely for the sake of gain. These imported laborers are not merely so many beasts of burden. If they were, we would not allow their importation if they were diseased, or if they threatened in the long run to destroy the quality of the stock here. But they are men, — becoming part of our social organization, liable to come on our poor-rates as soon as they have finished the job for which they were imported, demanding places in our hospitals when they become sick or are injured, subject to our administration of justice and to be supported in our prisons and penitentiaries. Still further, these men in a few years acquire the right to vote, determine our municipal elections, and control the expenditure

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of our public moneys. But the parties importing the laborers do not take any of these things into consideration. What they are doing is furnishing so much labor, skilled or unskilled as the case may be, generally the latter, and they pick up this labor wherever they can and at the cheapest rate they can, for upon that depends their profit. They do not consider the moral character of the man, or whether he will make a good citizen. That the future character of our population should be determined by Italian padrones seeking to make a few dollars for themselves, and by sub-contractors on railroads seeking the cheapest labor they can get, is intolerable. Any such traffic as that deserves no countenance from the state. It is giving way a little too much to the spirit of individualism.

A third measure should be the raising of the requirements for naturalization. The condition of things has entirely changed since our present naturalization laws were passed. In former times it was desirable that these new-comers should be made a part of the body politic as soon as possible, and that they should become interested in public affairs. Their number was not so great that there appeared to be any danger of their acquiring too much influence. At the present time they are so numerous that they threaten to swamp the native influence upon which depends our capacity for self-government according to the American system. Of the perniciousness of this foreign vote we have evidence in every municipal election in our great cities. Again, the present immigrants do not display the same disposition as those of former years. They used to be friendly to our form of government. Many of them came here enthusiastic for the republic, feeling that they were escaping from a despotism at home. They were ready to adopt our institutions, to take part in political life and become good citizens. This is to a large extent changed. Many of the immigrants come from a class of society which does not concern itself about the form of government. They know little of our institutions or of our history, and they care less. The franchise means to them simply an opportunity to sell their votes, and liberty is license to do as they please. Worse than that, there is a con-

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siderable body of socialists who are directly hostile to our form of government and to all existing social institutions. They are far in advance of our republic, and freedom is used by them simply for the purpose of agitating for the overthrow of all institutions. We can exclude anarchists and socialists by no system of inspection. Our only remedy is a sharp and severe administration of the criminal law which shall teach them that this country offers no better field for the commission of crime than do the countries of the old world, and which shall discourage their coming. But there is no reason why we should put political power into the hands of these persons who proclaim themselves to be hostile to all government. Even when the immigrants are not socialists, they are too untrained in self-government to participate intelligently in public affairs. The limit of required residence should be made longer, and an educational or property franchise might profitably be required.

The measures thus far are for the purpose of escaping the evils which unlimited immigration brings upon us. Other measures might be taken, it seems to me, for the purpose of discouraging the immigrants from coming. One would be to co-operate heartily with foreign governments for the purpose of regulating the business of transportation. Much of the present immigration is under the artificial stimulus of emigration agencies. These agencies should be carefully regulated. They should not be suffered to make false representations. They should not be allowed to solicit emigrants. They should be compelled to fulfil strictly the contracts they have made, and to take care that the immigrant is provided for after he reaches this country. This work must be done chiefly by the governments on the other side. We can see to it that the contract is carried out after the immigrant is landed, and that the charges made are fair and reasonable. Taking away the abnormal profit which is made by plundering these poor people would drive many of the persons out of the business and thus remove this artificial stimulus which benefits none of the parties concerned, which induces persons to leave their homes who had much better remain there,

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and lands them in a country where they are neither needed nor wanted.

Finally, I believe much could be accomplished by correspondence with foreign governments in the way of requiring that the immigrants shall bring some sort of certificate that they are of good character, able to support themselves, possessed of some skilled trade or of property or some means of starting in the new world, that they know where they are going and what they are going to do when they get there. These certificates might be issued by our consular officers. They would, it is true, be dependent on the local authorities for their information, but there would be enough parties interested, — the persons themselves, their friends on this side of the water, the local authorities trying to retain them, the steamship agents trying to get them, — to furnish abundant evidence in each case. An additional security might be required from the steamship companies which would make them careful not to receive any who did not come up to the requirements. All these things should be intended not so much as absolute restrictions as to discourage persons changing their domicile out of mere thoughtlessness or disposition to wander.

RICHMOND MAYO SMITH.

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ARE THE STATES EQUAL UNDER THE CONSTITUTION?

IN respect to the question of ultimate political supremacy under the constitution of the United States, the result of the civil war gave an answer that was decisive. No argument based in any particular upon the principle of state-sovereignty can ever again be tolerated in the arena of constitutional debate. Our fundamental law must always henceforth be viewed as the expression of a nation's will. There is abundant room for difference of opinion as to the extent of the authority that is entrusted to the government by the people; there is food for endless controversy in the distribution of powers among the many governmental organizations, and among the various departments of each; but the right of any particular community to maintain its own idea on either of these points against the contrary assertion of the organ of the whole people will never again call for recognition. The conviction in the South that the state had absolute rights as against the nation was well known to be the basis of the secession movement and the source of the country's woes. Public opinion in the victorious section demanded as the first fruit of its triumph the annihilation of every principle upon which the pernicious dogma could possibly find support. Hence the sweeping invasion by national legislation of the region hitherto deemed sacred to state rights. Hence the culminating doctrine that resistance to the will of the nation instantly divests the state of all rights whatever.

In the circumstances of the time it was a very easy matter to legislate away what had been claimed to be rights of the states. To provide for the permanence of the legislation required care. The last three amendments to the constitution, especially the fourteenth, make a number of extremely important powers irrecoverable. Besides these, the precedents of the mere legislation oppose a substantial barrier to any future demonstra-

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tion against the central stronghold. Among the less prominent features of this barrier was the series of acts which has suggested the subject of this paper. Between the outbreak of the war and the close of the reconstruction two new states were admitted to the Union, and eleven of the old states were restored to the constitutional relations which were broken off by secession. In both the acts admitting the new states and those restoring the old, the operation of the laws was made contingent upon the acceptance by the states of certain fundamental conditions. The mere fact of conditions in an act of admission was no novelty; the content, however, of those under consideration was in a large measure unprecedented, and was wholly significant of the times. In the discussion of the matter, the ancient dogma that all the states of the Union are constitutionally endowed with precisely equal powers was subjected to a careful examination in the light of the modern conceptions of our system. Under the influence of the state-sovereignty theory, the principle had been generally considered axiomatic. But now, like so many other monuments of the *ante-bellum* system, it was boldly attacked and threatened with utter demolition.

It is the purpose of this paper to determine not so much whether the states *ought* to be equal in powers, but whether, as a matter of fact, they *are* equal, under the authoritative construction up to date of the constitution and the laws. The method adopted will be, first, to examine historically the process of admitting states to the Union, and, second, to discuss the bearing of the process upon the relations of the states to the general government.

The germ of the doctrine of equal states and the model for all the pertinent provisions of *ante-bellum* legislation in admitting new members to the Union are found in the various acts by which the old Confederacy acquired dominion and established government in the great region between the Alleghanies and the Mississippi. In 1784 Virginia took the first formal step toward settling the disputes that had long raged about this territory. All her claim to lands northwest of the Ohio river was ceded to the United States. The cession, however, was

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conditional. It was stipulated that the ceded region should be laid out and formed into states, and that the states so formed should be distinct republican states, and should be admitted as members of the Confederate Union, having the same rights of sovereignty, freedom, and independence as the other states.[1] Other stipulations also were inserted, looking to the security of certain land-grants previously made by Virginia, and all were formally accepted by the Congress. The latter body had indeed willingly offered the pledge to form the territory into equal states as an inducement to the states to make the much desired cessions.[2] It thus appears that the principle of equality between the original and the newer states finds its first expression as an indispensable prerequisite to an enormous increase of the central government's dignity and power.

Shortly after the cession of the territory northwest of the Ohio, the Congress provided by resolution for its government. This act of 1784 was the immediate predecessor of the more famous ordinance passed three years later. Its provisions are of interest as embodying certain forms of compact which have appeared in almost every act of admission up to the present day. After a description of the process by which the new states to be formed in the territory should become full-fledged members of the Union, a series of clauses was recited, which were to stand as a compact between the United States and each of the new states, unalterable except by common consent. These clauses provided that the states should forever remain a part of the Confederacy, that they should in no case interfere with the disposal of the soil by Congress, that they should impose no tax upon lands owned by the United States, that their governments should be republican, and that the lands of non-resident proprietors should not be taxed higher than those of residents before the state's delegates should be admitted to vote in Congress.[3] When this law was superseded by the ordinance of 1787, the same provisions were included in the

[1] Poore: Federal and State Constitutions, p. 429.
[2] Story, Commentaries, sec. 1316.
[3] Curtis' History of the Constitution, vol. i, p. 297.

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"articles of compact between the original states and the people and states in the said territory." They constituted, however, only a small proportion of the terms in the new instrument. Among the additional clauses of interest to our investigation were found these: no person shall be molested on account of his mode of worship or religious sentiments; navigable rivers must remain free public highways; whenever any of the states to be formed shall have 60,000 inhabitants, "such state shall be admitted by its delegates into the Congress of the United States on an equal footing with the original states in all respects whatever";[1] and finally, the celebrated anti-slavery clause which had been voted down in 1784.[2]

The ordinance of 1787 contains substantially every provision that is to be found, by way of compact or fundamental condition, in any act of admission prior to the civil war. On it were based the forms of cession and government by which the lands west of Georgia and North Carolina became territories of the United States. There is room for serious doubt as to the power of the old Congress to guarantee the admission of new states on equal terms with the old. Madison, in *The Federalist*, regards the promise in the ordinance of 1787 as wholly unauthorized by the Articles of Confederation.[3] But a new condition of affairs was brought about by the adoption of the constitution, and the re-enactment of the territorial ordinance by the new Congress in 1789. There was no doubt whatever of the power of Congress under the constitution to admit states on an equal footing with the original thirteen. The uncertainty now became as to whether the new-comers could enter on any other terms. The debates in the convention revealed considerable soreness among many politicians of the Northern and Eastern states at the prospect of the overwhelming weight of the South and West when the new states should be well settled. Manifestations of this feeling were frequent during the long struggle over the adjust-

[1] Poore's Constitutions, p. 433.

[2] "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted."

[3] *Federalist*, no. 38, end.

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ment of representation.[1] Gouverneur Morris was the most outspoken in hostility to the equality of the new members of the Union. Having failed in an effort to discriminate against them in the matter of representation, he was more successful when the clause in reference to the admission of new states came up for discussion. As reported from the committee of detail, this clause provided that such states should be admitted by a two-thirds vote of Congress. Only in reference to those arising within the boundaries of any of the old states was it declared that they should be admitted on the same terms with the original thirteen. All others, by implication, were subject to the discretion of the legislature. Morris, however, objected to limiting this discretion in any way, and on his motion the distinction was stricken out and the clause was remodelled in its present form, *viz.*, "New states may be admitted by Congress into this Union."[2] So far as the intention of this clause is concerned, therefore, there seems to be no reason to assert that the constitution forbids inequality. Let us now review the practice and precedents in the further growth of the nation.

Vermont was the first new state to enter the Union. Her admission had been contemplated by the framers of the constitution, and the final form of the clause in reference to new states within the jurisdiction of the old had been determined with a view to her quarrel with New York.[3] Congress' act of admission consisted of a simple statement that Vermont should be a member of the Union. The same simplicity characterized the entrance of Kentucky. This state originally formed the western half of Virginia. Virginia agreed to the separation of the territory on certain conditions to be accepted by the latter, and by the United States. The act of admission simply recognized the new state. Tennessee was the next to enter the Union. The act of cession by North Carolina contained about the same stipulations as the instrument by which the Northwest Territory was granted by Virginia. The act of admission

[1] Bancroft, History of the Constitution, II, pp. 84, 85, *et passim*.
[2] Elliot's Debates, V, p. 493.
[3] Curtis, Hist. of the Const., vol. ii, p. 353.

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presented for the first time in a Congressional enactment the formula: "on an equal footing with the original states in all respects whatever."[1] This clause occurs in either the enabling act or the act of admission of every state subsequently admitted.

The first state formed from the Northwest Territory was Ohio, in 1802. She was also the first to pass from the territorial form under the direction of an enabling act. This act has been the model for all succeeding legislation of the kind, and in it may be found provisions that have since been relied upon as a basis for the claim of Congress' right to exact conditions of an applicant for admission. By it the inhabitants of the territory included in certain designated boundaries were authorized to form a constitution which must be republican and not repugnant to the ordinance of 1787. These two requirements were designed to fulfil the duty of the United States, first to the constitution, in guaranteeing a republican form of government, and second, to Virginia, in carrying out the terms of the act of cession, as embodied in the ordinance of 1787. The enabling act then proceeds to offer to the state's convention, for its free acceptance or rejection, three propositions: first, to grant to the state certain lands for the support of schools; second, to grant to the state the salt-springs and sufficient adjacent land to work them; and third, to apply to the building of roads and canals for the benefit of the state five per cent of the proceeds of public lands sold within the state. The acceptance of these offers, however, must be accompanied by an ordinance, irrevocable without the consent of the United States, declaring that lands sold by the United States should be exempt from taxation for a period of five years after the sale. Such an ordinance was duly enacted.

In 1806, Louisiana became a state. The enabling act in this case laid down a large number of requirements to which the constitution of the new state must conform. These were based mainly on the ordinance of 1787, and were obviously designed to counteract any foreign influences that might have taken root

[1] Poore's Constitutions, p. 1677.

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while the territory was under European dominion. No terms were *offered* to Louisiana as to Ohio. But an irrevocable ordinance was *demanded*, which should bind the state to all the stipulations contained in the ordinance of 1787, as well as to the five year exemption from taxation of public lands sold by the United States. There is no equivalent whatever offered in return for these demands, and the peremptory character of Congress' dealing with the state is revealed still more distinctly in the act of admission. For some reason, the irrevocable ordinance which the Louisiana convention adopted omitted the declaration that the Mississippi and other navigable rivers should be free from tax or toll. Congress, therefore, made that declaration a proviso of the state's admission, and clinched it with these words: "The above condition, and also all other the terms and conditions contained in the third section of [the enabling act] shall be considered, deemed, and taken fundamental conditions and terms upon which the said state is incorporated in the Union."[1] Such language might be thought fatal to the claim of equality among the states, were it not that, in the same section, the act declares Louisiana admitted "on an equal footing with the original states in all respects whatever." The legislator could only have joined these two provisions on the understanding that all the original states labored under the same restrictions that were imposed upon Louisiana.

No new principle appeared in the admission of the next five states. The familiar irrevocable ordinance was a feature of each case, except that of Maine. Indiana, Illinois, and Alabama were granted an equivalent for their concessions, like Ohio; Mississippi followed Louisiana in granting the ordinance absolutely. Maine came in with the consent of Massachusetts, and with no provision further than that of equality with the original states.

The admission of Missouri suggests immediately the ominous struggle over the slavery restriction. Tallmadge's famous motion[2] was to impose as an absolute condition upon Missouri's exist-

[1] Poore's Constitutions, p. 710.

[2] To amend the bill for admission by adding this proviso: "*Provided*, That the

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ence the identical proposition which had, in the states formed in the Northwest Territory, assumed the form of a compact. Without stopping at this point to examine the line of argument adopted by the friends of slavery, it is sufficient to remark that the persistent denial of Congress' right to withhold from a new state a right possessed by the original members of the Union was the weapon which proved most troublesome to the restrictionists. Only the boldest spirits ventured to combat the proposition that the nature of the Union demanded perfect equality among its members. The great struggle occurred over the enabling act. Outside of the clause which embodied the celebrated compromise, this act was substantially the same as its immediate predecessors. The resolution admitting the state, however, presented another case of absolute condition. It declared that

> Missouri shall be admitted into this Union on an equal footing with the original states in all respects whatever, upon the fundamental condition, that the fourth clause of the 26th section of the third article of the constitution submitted on the part of that state to Congress, shall not be construed to authorize the passage of any law

that shall conflict, in short, with the inter-state rights of citizens as provided for by the constitution of the United States.[1] And the assent of the legislature of the state to this condition was demanded and was duly given.

Arkansas organized a state government without waiting for the enabling act, which had by this time come to be considered essential. Congress admitted her, upon the express condition that the people of the state should not interfere with the primary disposal of the public lands, nor tax them while United States property. This proceeding, however, was evidently unsatisfactory; for a supplementary act was passed in which these same conditions were made, with others, the equivalents for the cus-

further introduction of slavery or involuntary servitude be prohibited, except for the punishment of crimes, whereof the party shall have been duly convicted; and that all children born within the said state, after the admission thereof to the Union, shall be free at the age of twenty-five years."

[1] 3 Statutes at Large, 345.

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tomary land grants, and were put in the form of an irrevocable ordinance.[1] Michigan's difficulty with Ohio about their dividing boundary[2] accounts for the appearance in her admission act of the express condition that her boundaries shall be as described in the act. Iowa was admitted on the fundamental condition that the assent of the township electors should be given to the act of admission. From this time to the admission of Nevada, in 1864, the legislation of Congress reveals no novelty pertinent to our subject. Every clause of both enabling acts and acts of admission is a copy of some one of those that have been noticed.

Nevada entered the Union to the accompaniment of Grant's guns on the Potomac and Sherman's on the Chattahoochee. It would be strange indeed if no mark of those fateful times appeared impressed upon her. In the enabling act, we discover that her constitution was required to harmonize not only with the constitution of the United States, but also with the principles of the Declaration of Independence. Further, the convention was required to provide by ordinance, irrevocable without the consent of the United States and the people of the state: first, that there should be neither slavery nor involuntary servitude in the state; second, that there should be perfect toleration of religious sentiment; and only third, that the public lands should be secured to the United States. These first two provisions were not absolutely unprecedented. Both were contained in the ordinance of 1787, and had, therefore, become part of the fundamental law of five states. But the special mention of them in an enabling act was significant.

It was left for Nebraska, in 1867, to become a state under an entirely novel restriction. The act of admission is declared to take effect

> upon the fundamental condition that within the State of Nebraska there shall be no denial of the elective franchise or of any other right to any person because of race or color, excepting Indians not taxed, and upon the further fundamental condition that the legislature of said state, by a solemn public act, shall declare the assent of said state to said fundamental condition.

[1] Poore's Constitutions, p. 118.

[2] Michigan, by Judge Cooley, in American Commonwealths series; pp. 214 *et seq.*

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Colorado, the latest of the states to come in, has the provision for religious tolerance thrown into the irrevocable ordinance by which the security of public lands is established. The grants of lands for schools, public buildings, *etc.*, are in her case, as in that of Nevada and Nebraska, made absolute benefactions.

This completes the review of the legislation upon the addition of new states. It remains now to consider the case of the so-called rebel states, which were declared by Congress to have forfeited, by the attempted secession, all rights guaranteed by the constitution to members of the Union. By act of March 2, 1867, Congress announced the circumstances under which the forfeited rights would be restored. Later acts provided for carrying out the proposed plan of reconstruction. Tennessee had previously been admitted, upon conforming voluntarily to the general lines of Congress' desire. Of the other ten, all but three were finally admitted to representation in Congress, as states of the Union, upon the fundamental condition that their constitutions should never be so amended as to deprive any citizen or class of citizens of the right to vote, except as a punishment for crime. Virginia, Mississippi, and Texas were delayed, through no fault of their own, in fulfilling the requirements of Congress, and the consequence was that the ardor of the advocates of conditions rose in the meantime to such an extent that two additional limitations on the equality of those states were imposed; the first forbade any law excluding negroes from the right to hold office; the second forbade any amendment of the state constitution that should deprive negroes of equal school privileges with the whites.[1]

From this survey of the practice since the United States became an independent nation, one fact stands out very distinctly, and that is, that Congress, whether authorized by the constitution or not, has, in the exercise of its power to admit new states, imposed conditions on the applicants, and that too, both in substance and in express terms. It is equally undeniable that, if these conditions are valid, and if by virtue of them rights

[1] McPherson, History of Reconstruction, p. 573.

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are withheld that are enjoyed by the original states, the ancient dogma that this is a union of equal states is without foundation in constitutional law. The first question then that must command our attention is this: Are the laws of Congress imposing conditions upon new states, in accordance with the constitution of the United States?

The conditions that we have found in our examination may be grouped in respect to their form in three classes as follows: first, compacts, which, by unconstrained agreement, limit not only the states but also the United States in specified particulars; second, absolute conditions upon the admission of the states, but explicitly conditions precedent, and hence exhausting their force at the moment the admission is perfected, as for example, that which required the antecedent consent of the township electors in Iowa; and third, absolute conditions whose force is obviously intended to be permanent, and which forever restrict the power of the state. The best example of this class is that which forbids the reconstructed states ever to amend their constitutions in certain respects.

The subjects in respect to which Congress has enacted limitations fall under five heads: first, public lands; second, navigable waters; third, inter-state rights of United States citizens; fourth, the principles of civil and religious liberty; and fifth, the right of suffrage.

Let us now ascertain upon what grants of power in the constitution the right of Congress rests to legislate in each of these forms and upon each of these subjects. And first, is Congress authorized to make a compact with a state of the Union, either existing or in embryo? The theory of our system is that the central government is one of strictly limited powers. For the definition of such powers as it has, only the constitution is to be consulted. By that instrument Congress is established as a law-making body. Especial care is taken to prevent the effectiveness of any action of the two houses under any other form than that specifically laid down in the constitution. Every order, resolution, and vote must be in fact a law.[1] In the same way, a

[1] Constitution, art. i, sec. 8.

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compact to which Congress is a party, can have no extraordinary force on account of its special form. It is nothing more or less than a law. The agreement by the state to its terms adds nothing to its efficacy. Its validity can be tested only by the constitution. If Congress is authorized to enact that a certain regulation shall take effect upon the performance of some act by a certain community, it is authorized to enforce the regulation without regard to such act. A compact must be regarded then, so far as Congress is concerned, simply as a law. The question as to Congress' right to enter into a compact with a state becomes merely a question as to the constitutional power of the national legislature to enact a law involving the same principles. Our examination of the validity of the compacts which are supposed to create inequalities among the states must therefore deal with the substance rather than the form. We must ascertain under what grant of power in the constitution the various terms of the acts were enacted.

Conditions precedent to admission must be treated on the same principle. The constitution itself, however, renders discussion of these practically of no importance to our subject. Any act of Congress which affects United States territory only before its assumption of the state form may be justified under the plenary power granted by article 4, section 3. The violent and protracted controversy as to the construction of this clause in connection with the slavery question may be considered to have been settled by the war. In spite of the contrary opinion in the Dred Scott case, the power of Congress to make rules and regulations concerning the territories will be generally conceded now to be unlimited save by the express prohibitions of the constitution. Conditions, therefore, which prescribe certain acts by either the people or the government of a territory as preliminary to admission as a state, are wholly within the power of the national legislature.

An entirely different principle is involved in the matter of conditions subsequent, *i.e.*, acts of Congress passed while the territorial form prevailed, but intended to be of binding force after the assumption of the state dignity. The solution of the prob-

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lem here is very similar to that in the case of compacts. The condition is only a law of Congress and has no greater force than any other law. The validity of the law depends on the constitutional authority for it; or, in short, upon the substance rather than the form. It is held by some, however, that by the wording of the constitution, Congress is given unlimited control over the substance of the admitting act. "New States may be admitted by Congress into this Union," is the form the clause takes. It has been shown above that the probable intention of Gouverneur Morris in thus phrasing it was to leave room for an implication of power in Congress to impose conditions upon new states. The probability of such a purpose becomes certainty in the light of a letter written by Morris in 1803. "I always thought," he says, "when we should acquire Louisiana and Canada [*sic*], it would be proper to govern them as provinces and allow them no voice in our counsels. In wording the third section of the fourth article, I went so far as circumstances would permit to establish the exclusion." He significantly continues: "Candor obliges me to add my belief that had it been more pointedly expressed, a strong opposition would have been made."[1] At the time of Louisiana's admission as a state, in 1811–12, the Federalists made a violent resistance to the equality clause, and Josiah Quincy went so far as to assert his solemn conviction that the admission of new states from acquired territory on equal terms with the old, was sufficient ground for a dissolution of the Union. The principle, however, was established, and continued in practice down to the civil war, of not making the implication for which Morris so craftily left room. With the tide of loose construction that set in with 1861, the usage in this matter shared the fate of so many others. While the doctrine of unlimited Congressional discretion as to conditions of a state's admission cannot be said to be definitely established, yet it is beyond doubt that such an idea finds support in a very respectable body of constitutional lawyers. The argument of the supporters of this theory, of whom Senator Edmunds is perhaps the most conspicuous, is

[1] Quoted by Judge Campbell in the Dred Scott case; 19 Howard, 507.

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that Congress is the agent of the nation in creating political corporations called states. Through the constitution, the nation has given Congress a discretion as to the powers it may confer on such corporations, limited only by the positive prohibitions of the fundamental law. There is nothing in the constitution requiring that the states shall be equal. The character of each corporation is impressed upon it by the special act by which it is admitted. No court can go behind the provisions of such an act to apply any extra-constitutional theory that all states have equal rights. In respect to such powers and duties as are positively ascribed to the states by the constitution, there is, of course, equality. Every state is entitled to an equal representation in the Senate, and to a proportionate number of members in the House of Representatives. Every state, whether new or old, is equally entitled to the guarantee of a republican form of government. But beyond such clearly defined rights, Congress may determine as it pleases the degree of restriction which it deems best for any particular community.[1]

In opposition to this view, the older theory maintains that the equality of rights in the states is distinctly embodied in the constitution. Even if the above stated construction of the clause about the admission of states were good, it must be modified by the amendments which have been added to the original instrument. Article ten of these amendments declares that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." This does not say "to the old states," or "to some of the states," but "to the states"; and it would be palpably erroneous to construe this expression to refer to less than every state in the Union. But if this is the case, any state can claim every right that is not delegated to the United States or prohibited to the states. In short, the instant a community becomes entitled to the name of state, it has every power that is exercised by any other community bearing that name. A court in deciding upon a state's right to exercise a

[1] See debates on the admission of Nebraska, *Congressional Globe*, 2d Session, XXXIX Congress.

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given power, must look not to the act of admission, but to the constitution under which this act of admission was passed. If the power in question is not delegated to the United States by the constitution nor prohibited by it to the states, it rightfully belongs to the state, anything in the act of Congress to the contrary notwithstanding. But without reference to this amendment, the clause respecting admission, it is maintained, will not bear the construction sought to be put upon it. This clause does not authorize Congress to *create* states, but to *admit* them. The creation of the state is antecedent to the admission, and springs from the will of the people inhabiting the territory. The enabling act merely puts the stamp of the nation's approval upon the expression of this will. This may be, and in many cases has been, dispensed with. The genius of our institutions does not recognize the possibility of forever withholding from a community desiring it, the privilege of local self-government under the constitution.

It must be confessed that, with all the strength of this theory, the derivation of the right to the state form from the genius of our institutions, or, as some have it, from the nature of things, is a little unsatisfactory. The foundation is a trifle too shadowy for the very substantial structure that rests upon it.

No case has ever been decided by the Supreme Court in such form as to settle definitely which of these two conflicting theories is correct. As might be supposed, a very strong leaning towards the latter is discernible in several opinions rendered in the two decades immediately preceding the war. It was found possible, however, in every case, to decide the issue under some clause of the constitution other than that referring to the admission of states. The substance rather than the form of the admitting acts was considered. But whichever of these theories may ultimately prevail, the answer to the question we have set before us, — *viz.*, whether at the present time there is any inequality among the states — must be sought in the content of the supposed restrictions that thus far have been enacted. Compacts have been made with new states, by which those states resign certain rights; fundamental conditions have been

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imposed, prohibiting the exercise of certain rights. Whether or not Congress was authorized to make the limitations, let us consider to what extent such limitations discriminate against the newer states.

We have already classified the restrictions that have been enacted and have found the first prominent subject to be the public lands of the United States. Either in the form of a compact, or by way of fundamental condition, all but three of the states admitted since the formation of the constitution are to-day forbidden to tax lands, the property of the United States; and in most cases the exemption covers the lands for from three to five years after their sale. The power of taxation has always been held to be an incident of sovereignty. Does this limitation upon the tax power of a state, then, interfere with the sovereignty which belongs to the state in respect to matters not delegated to the United States by the constitution?

As to the property of the United States, it has been settled that wherever it is situated it is above the state's demand for tribute. In practice, the Federal government regularly secures a cession of jurisdiction by the state within whose limits land for a mint, post-office, or other necessary institution is demanded. This custom tended to obviate all controversy on this precise point. The general question of a state's right to tax property of the United States was discussed quite fully by the Supreme Court in McCullough *vs.* Maryland. Here the state's lawyers contended that by the constitution the tax power of the state was unlimited save as to imports and exports.[1] This view was explicitly rejected by the court; but a positive opinion was not required upon more than the single matter of the United States Bank. This, it was decided, the states could not tax; for the bank was a constitutional means for carrying into execution the powers vested in the general government. Whether land was such a constitutional means was, until very recently, an unsettled question. Justice McLean is responsible for the assertion that the government has paid taxes to the old states

[1] 4 Wheaton, p. 328 *et passim*. *Cf.* Constitution, art. i, sec. 10, cl. 2.

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for its lands.[1] Not till a year ago was the problem authoritatively solved by the Supreme Court. In Van Brocklin *vs.* Tennessee,[2] Justice Gray, in an opinion extraordinarily clear and exhaustive, concludes that neither the people nor the legislature of Tennessee had power, by constitution or statute, to tax land so long as the title remained in the United States. The basis of the opinion was the principle of McCullough *vs.* Maryland, and the further conclusion that "the United States do not and cannot hold property, as a monarch may, for private or personal purposes. All the property and revenues of the United States must be held and applied, as all taxes, duties, imposts and excises must be laid and collected, 'to pay the debts and provide for the common defense and general welfare of the United States.'" This decision leaves no room for any claim that the conditions prohibiting new states to tax government lands deprives them of any right enjoyed by the old members of the Union.

The exemption of the first purchaser of public land from the tax power of the state for a time falls within a different category from the matter just discussed. In by far the greater number of instances, this exemption is one of the considerations in a compact between the United States and the new state at its admission, by which, in return for the promise of exemption, various tracts of land are donated to the state. The transaction differs in no respect from an ordinary contract. The state foregoes the proceeds of the tax on certain property and receives value in the shape of certain other property. No political right is resigned by the state, and the United States is vested with no new political power. But it may be said that the state, as a sovereign power in respect to real estate within her boundaries, may repudiate the bargain at will. How could a purchaser obtain redress, if a tax were imposed before the expiration of the specified time? Would the United States courts undertake to restrain a state from taxing its own citizens? There seems to be good reason to believe that they would. In the early case

[1] United States *vs.* R. R. Bridge Co., 6 McLean, 531.
[2] 117 U. S. 151.

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of Green *vs.* Biddle,[1] the Supreme Court decided that a compact by which Kentucky agreed to apply the law of Virginia to certain land cases could not be violated by the former without bringing her in conflict with the constitutional provision in reference to impairing the obligation of contracts. There is no reason why a compact with the United States should not be subject to the same rule. But the compact in this case could not, of course, be binding on the state if the other party had exceeded its powers in making the agreement. The United States can only contract within its constitutional powers. Its power in this case, however, may very fairly be derived from the authority to dispose of the territory of the nation.[2] This same authority could also be made to cover those cases in which the five year exemption is enacted not as a contract but as a mere condition. Here there would be more room for debate, but in view of the very liberal margin of discretion which the court has recognized to Congress in the choice of means for executing its powers, it is not at all likely that this extra inducement to purchasers would be adjudged beyond the line.

In addition to this limitation of the tax power of the new states, we find in most acts of admission the provision that the respective states shall disclaim title to the public lands, or shall not interfere with the primary disposal thereof. That such a provision is no real restriction does not require demonstration. The land is the property of the United States, and cannot be made more so by any law of Congress. These formulas were inserted in the early acts out of abundant caution, and they are at the present day mere survivals.

A special case that falls under this same head is that of Michigan's southern boundary. Michigan claimed that she had, by the ordinance of 1787, an indefeasible right to enter as a state with the boundaries described therein. These boundaries would have included a strip of territory that had been assigned to Ohio. Congress settled the hot controversy which raged on the point by admitting the new state on condition that she

[1] 8 Wheaton, 87.

[2] *Cf. dicta* in Pollard's Lessee *vs.* Hagan, 3 Howard, p. 224.

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accepted a boundary that included less than she demanded. The question involved here seems to be rather the construction of the ordinance of 1787 than the ultimate control over the lands, and the so-called condition is only a regulation by which conflicting constructions are compromised.[1]

To sum up our conclusions in reference to the clauses of the admission acts affecting public lands, it appears that no power has been exercised therein which could not be applied with the same effect to the older states, — in short, that no inequality of rights among the states exists by virtue of such clauses.

The second subject which has been covered by fundamental conditions is the navigable waters of the new states. The right of Congress to make the rule that they shall be free from toll is no longer a debatable question. By the constitution Congress is authorized to regulate commerce among the several states. In the case of Pollard's Lessee *vs.* Hagan,[2] the Supreme Court was called upon to construe the article of compact by which Alabama resigned the right to impose any burden on the navigation of her rivers. "This supposed compact," the decision runs, "is nothing more than a regulation of commerce, to that extent, among the several states."[3] This same principle was reaffirmed and enlarged upon in Withers *vs.* Buckley *et al.*,[4] some years later; and finally in Gilman *vs.* Philadelphia,[5] decided in 1865, the court clinched its former judgments by the broad assertion that "the power to regulate commerce comprehends the control for that purpose and to the extent necessary, of all navigable waters of the United States which are accessible from a state other than those in which they lie." In view of this record, it is idle to seek for inequality among the states in this particular. Congress controls the Hudson and the Susquehanna to precisely the same extent that it does the Missouri and the Arkansas.

The third class of conditions includes, first, the common

[1] Cooley, Constitutional Limitations, 4th ed. p. 34.
[2] 3 Howard, 212.
[3] *Ibid.* p. 230.
[4] 20 Howard, 93.
[5] 3 Wallace, 724.

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clause that lands of non-resident citizens of the United States shall not be taxed higher than those of residents of the state; and second, the condition under which Missouri was admitted, *viz.*, that no law should be passed by the state by which any citizen of any other state should be excluded from the enjoyment of any privileges and immunities to which such citizen was entitled under the constitution of the United States. As to this latter matter, no discussion is necessary to show that there is no restriction placed upon Missouri that does not rest upon every other state. Missouri is forbidden to infringe, under color of her constitution, a clear provision of the Federal constitution. But the prohibition would be just as imperative in law without the act of Congress as with it; and Massachusetts has no more power to deprive a citizen of another state of his constitutional privileges and immunities than has Missouri. The same principle applies to one phase of the taxation of non-residents. Taxes are a burden to citizens, and exemption from taxation is therefore an immunity. Equal exemption of residents and non-residents is accordingly secured by the constitution, so far as concerns citizens of the several states. This has been so determined by the Supreme Court in the case of Ward *vs.* Maryland.[1] But the clause concerning the inter-state rights of citizens does not protect against discrimination such citizens of the United States as reside in the territories or in the District of Columbia. Can the land of such persons, then, be taxed by any state higher than the land of resident citizens of the state? If it can, the original states enjoy a right which is denied to every other member of the Union. The question, it must be confessed, is never likely to become of any practical importance. If it ever does come up for consideration, the fourteenth amendment will unquestionably be relied upon to settle it. It is there declared that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Whether an equal rate of taxation with the other citizens of a state in which his land is situated is a privilege or immunity of a citizen of the United States is what must be decided.

[1] 12 Wallace, 418.

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In view of the narrow construction of the fourteenth amendment adopted by the Supreme Court in the Slaughter House and all succeeding cases, it is not likely that any power over state taxation would be assumed under the prohibition of the amendment, and it is certain that in no other part of the constitution is authority for the substance of the restriction under consideration to be found. If then, Congressional conditions upon the admission of states are ever binding, there does exist in reference to the power of taxation, an inequality among the states.

The fourth class of restrictions includes only the single case of universal manhood suffrage demanded of Nebraska. The rebel states, it is true, were obliged to admit the negroes to the polls as a condition of restoration after the war; but the action of Congress in this instance was acknowledged on all sides to be an extraordinary proceeding based upon the war powers of the Federal government. Nebraska, however, on no special ground of necessity, was distinctly prohibited to deny the right to vote to any citizen on account of color. At this time, many of the Northern states still retained the word white in the suffrage clauses of their constitutions. No authority of any weight whatever questioned the right of the states to determine the qualifications of electors for themselves, or admitted any power in Congress to interfere with the rule adopted. If the law of Nebraska's admission, therefore, was valid,[1] that state passed the first years of its existence on a plane of distinct inferiority to the other states. The fifteenth amendment, however, removed the irregularity. By it, the limitation which had been imposed upon Nebraska by law was made effective upon all the states by the constitution. As far as the regulation of the suffrage is concerned, the power of each commonwealth in the Union to-day is exactly the same.

The fifth and last class of restrictions is that which embraces various provisions designed to secure the fundamental principles of civil and religious liberty in the states. First, as to slavery.

[1] The reasons assigned for the votes on the passage of the restricting clause in the Senate are interesting. See *Globe*, 2d Session XXXIX Congress, p. 360; also p. 450.

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By the ordinance of 1787 slavery was prohibited in all the states to be formed from the Northwest Territory. This ordinance was enacted as a law of Congress in August, 1789. Was its prohibition of slavery a valid restriction on the right of a state to determine for itself its domestic institutions? The violent and prolonged controversy on this point is familiar to every reader of our political history. As none of the states under the ordinance ever wished to establish slavery, the question never became a practical one. The Supreme Court held, in two cases,[1] that the ordinance had no more authority than any other law of Congress, and that its principles were only effective so far as discoverable in the constitution of the United States or in the constitutions and laws of the states respectively.[2] This view throws the question back again upon the constitution. No power to abolish slavery within a state was granted to Congress. Unless, then, the general power to impose restrictions on new states belong to the national legislature, Ohio and the adjoining states, in spite of the slavery prohibition in the ordinance, enjoyed equal power over the subject with the remaining members of the Union. In admitting Nevada, in 1864, Congress made no-slavery an article of fundamental compact with the state, and she was thus thrown into the same category with those formed from the Northwest Territory. All question as to the equality of the states in this respect, however, was removed by the ratification of the thirteenth amendment in 1865. If before that time the six states were inferior to the majority in their abstract power, to-day these latter are reduced to the lower level.

It is only when we take up a further consideration of civil and religious liberty that we come to a still enduring uncertainty. The states formed from the Northwest Territory, as well as several others, are to-day bound by the terms of their admission

[1] Permoli *vs.* Municipality, 3 Howard, 589. Strader *et al. vs.* Graham, 10 Howard, 94.

[2] For a different opinion, see Spooner *vs.* McConnell, 1 McLean, 344. Judge Cooley thinks that the weight of judicial authority favors the effectiveness of the ordinance even in such principles as are not re-enacted in the state laws. Const. Limitations, 4th ed. p. 34, note.

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forever to maintain in their constitutions what are recognized as the fundamental guarantees of civil liberty. The second article of compact in the ordinance of 1787 secures to the inhabitants of the territory the benefit of the writ of *habeas corpus* and of trial by jury, judicial proceedings according to the course of the common law, exemption from excessive fines and cruel or unusual punishments, and due process of law in the deprivation of life, liberty, or property. Compensation also is required for property or services taken by the state without consent, and any law impairing the obligation of contracts is declared void.

Only the last of these restrictions was placed upon all the states by the original constitution. The rest are contained substantially in the constitution of every state, and were until recently considered secure enough without the guarantee of the Federal government. In the fourteenth amendment, however, three clauses were inserted, with a purpose to guard against any invasion of the fundamental civil rights by the states.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

To what extent, then, do these clauses give the Federal courts a corrective jurisdiction over state legislation and procedure? Do they afford a constitutional foundation for the power assumed by Congress in laying upon the states the restrictions under consideration?

It was held at first by many lawyers that the phrase "privileges and immunities of citizens of the United States" would include all the ordinary ingredients of civil liberty. This was denied by the Supreme Court in the Slaughter House cases, and it was there decided that the fundamental civil rights were still, as before, under the primary care of the states.[1] A limitation is put upon the latter, however, by the prohibition to deprive of life, liberty, or property without due process of law,

[1] 16 Wallace, 77.

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or to refuse to any one the equal protection of the laws. "Due process of law" has been authoritatively defined to mean the process and procedure of the common law.[1] The courts have always manifested a disposition to construe the expression with the greatest liberality in favor of the individual.[2] Under such circumstances there can be no doubt that any state can be held within the bounds established for particular states by the ordinance of 1787 and the various admission acts. The privilege of bail, exemption from immoderate fines and cruel punishment, and compensation for expropriated property are elements of the due process which must, under the constitution, be observed in every state. Whether the privilege of the writ of *habeas corpus* is required by the clause under discussion may not be perfectly clear, but probability is strongly on the side of an affirmative answer. Judge Cooley considers that "due process" does not refer to rules of procedure only, but to "those principles of civil liberty and constitutional protection which have become established in our system of laws."[3] There can scarcely be a doubt that the principle of protection by the *habeas corpus* has become so established.

A single clause of the second article of the great ordinance has been left unconsidered. It is prescribed that the people shall always be entitled to proportionate representation in the legislature. It is obvious, without further comment, that this privilege is covered by the guarantee of a republican form of government in the constitution.

In the sphere of civil rights, properly so called, there is thus no distinction among the states in respect to their authority. Let us examine the matter of religious liberty. The first article of the ordinance of 1787 is in these words: "No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments in the said territory." This restriction, as part of the ordinance, was imposed upon a number of the states ad-

[1] Murray's Lessee *vs.* Hoboken Land Imp. Co., 18 Howard, 272.

[2] Davidson *vs.* New Orleans, 96 U. S. 97; R. R. Tax Cases, 13 Federal Reporter, 763.

[3] Constitutional Limitations, 4th ed., p. 441.

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mitted early in the century, but disappeared from view for a long time till it once more came to the surface in the admission of Nevada, Nebraska, and Colorado. It purports to put the freedom of worship in certain states under the protection of the Federal government. There has never been a pretence made that authority over this subject is conferred upon the Federal government by the constitution. The United States is prohibited by the first amendment from interfering with the free exercise of religion. The same clause forbids any abridgment of the right peaceably to assemble and to petition for redress of grievances. An opinion on the latter prohibition was rendered in the case of United States *vs.* Cruikshank.[1] It was argued by counsel that the prohibition implied that the right to assemble was a privilege of United States citizenship, and that it was therefore under the protection of Congress, by the fourteenth amendment. The court flatly rejected the plea. The claim to control by the United States over freedom of worship rests upon precisely the same ground. It follows, therefore, that the absolute power of Congress to impose restrictions upon states at their admission is the only foundation for the condition under discussion, and that if this power exists, the states which have entered with this limitation are to that extent inferior in rights to the others. As long, however, as the spirit of tolerance remains as it is among the people, this fact can have no more than a speculative interest.

This completes the review of restrictions upon the admission of states. A special case requiring notice is that of the rebellious states which were reconstructed by Congress. Practically these states were reduced to the condition of provinces, and then erected *de novo* into autonomous commonwealths. From a legal point of view, however, the Supreme Court refused to admit that the continuity of the state life had ever been broken.[2] The course of Congress throughout was declared to have been a legitimate exercise of the power to guarantee a republican form of government. Upon this authority in the constitution,

[1] 92 U. S. 542.

[2] Texas *vs.* White, 7 Wallace, 700. Chase's Decisions, 139. Gunn *vs.* Barry, 15 Wallace, 623.

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therefore, the justification of the conditions of restoration must rest. The first reconstruction act[1] required a constitution in each rebel state, framed by representatives chosen by impartial suffrage, and granting the franchise to the blacks. The ratification of the fourteenth amendment (and in case of Virginia, Mississippi, and Texas, of the fifteenth) was also demanded. These were conditions precedent to the resumption of state rights. Their force was of course exhausted at the moment of such resumption. But Congress' acts restoring normal relations contained the most stringent form of condition subsequent to be found in our history. It was declared a fundamental condition of each state's representation in Congress, that the state constitution should never be so amended as to deprive of the right to vote any citizen or class of citizens entitled to vote by the constitution in question. This deprivation of the right to regulate the qualifications of voters produced a most vital inequality between the reconstructed and the loyal states. It was removed, however, by the fifteenth amendment. But in the restoration of Virginia, Texas, and Mississippi, two further fundamental conditions were imposed. First, these states were forbidden to make the race, color, or previous servitude of any citizen of the United States a disqualification for holding office, or to discriminate in qualifications for office between classes of citizens; and second, their constitutions were never to be so amended as to deprive any United States citizens of the school rights and privileges secured therein.

The right to hold office is not expressly placed by the constitution under the guarantee of the United States.[2] The tendency of the Supreme Court's decisions does not indicate a probability that the right can be adjudged a privilege of United States citizenship, or be classed with those rights to which every state must give the equal protection of the laws. It is a historical fact that a determined effort was made, during the discussion of the fifteenth amendment in Congress, to

[1] Act of March 2, 1867.

[2] *Ultra* liberal construction might possibly regard it as incidental to a republican form of government, and thus justify its protection by Congress.

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include the right to hold office in the prohibition of that article. The proposition was passed at different times by both Senate and House, but finally disappeared in conference committee.[1] In view of this fact, the control of the whole subject seems to be still in the states, and the restriction placed upon Virginia, Mississippi, and Texas, deprives them of a right which is enjoyed by all the other members of the Union.

The guarantee of equal school privileges to all citizens of the United States within those three states is based on an assumption that educational facilities are a right of United States citizenship. There is no ground in the constitution for this assumption. Education is a matter which was left wholly within state control. Whatever privileges in this direction are granted by a state to its citizens may, of course, be enjoyed by citizens of other states while within its boundaries. This enjoyment, however, is a privilege that results from state citizenship under the *ante-bellum* constitution. Citizens of the United States, as such, cannot claim it. The case is entirely analogous to that of the taxation of the land of non-residents. Unequal laws are unconstitutional as far as citizens of other states are concerned; citizens in the territories and the District of Columbia are not thus protected. The act of Congress, therefore, which forbids any discrimination whatever in the three states limits their power to that extent within the bounds prescribed for the rest.

The review of the acts of Congress by which the powers of the various states have been restricted is now complete. It has been shown that a great majority of the compacts and fundamental conditions were such only in name, and were wholly without influence on the constitutional relations of the Federal and state governments. We have seen how several real and vital limitations imposed by law upon individual states were afterwards extended to all by amendment of the Federal constitution. The residuum of matters in which inequality may still be fairly held to exist is small and comparatively unimportant. In brief, it may be summed up thus: Ohio, Indiana, Illinois, Michigan, Wisconsin, Mississippi, Alabama, Louisiana, Arkan-

[1] *Globe*, 3d Session, XL Congress, pp. 1040, 1428, 1481.

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sas, Minnesota, Iowa, Oregon, California, Kansas, Nevada, Nebraska, and Colorado have not the right, enjoyed by the original states, of discriminating in land-taxation against citizens of the United States who are not citizens of any state; Ohio, Indiana, Illinois, Michigan, Wisconsin, Louisiana, Mississippi, Alabama, Nevada, Nebraska, and Colorado are forbidden to establish any rule interfering with the freedom of worship or religious sentiment, while no such prohibition rests upon the other states; and finally, Virginia, Mississippi, and Texas are forbidden to make race, color, or previous condition of servitude a disqualification for holding office, or to amend their constitutions so as to deprive any citizen of the United States of the school privileges secured therein.

The conclusion from all the historical facts seems to be that at no time since the formation of the present constitution have all the states of the Union been in the enjoyment of equal powers under the laws of Congress. A principle of constitutional law under our system can never be said to be fully established until it has received the positive sanction of all three co-ordinate departments of the government. Tested by this rule the theory of equal states falls to the ground. Neither by the judiciary nor by the executive has the doctrine been authoritatively affirmed; while the action of the legislature has been in many cases in positive contradiction of it. A century of legislation cannot but be regarded as making a pretty strong foundation for the construction of any part of the constitution. It is the legislature that must interpret the supreme law in the first instance, and such interpretation must stand as sound until overruled by the Supreme Court. But in political questions the court has consistently declined to take jurisdiction. In such matters the action of the legislature is conclusive. There seems to be good reason for considering the relations of the United States to the individual states in respect to the terms of admission a political question. If it is, the theory that all states have equal powers must be regarded as finally defunct; if it is not, the theory can only be galvanized into life by a powerful act of judicial construction.

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But while such is the technical position of the doctrine in constitutional law, it enjoys a somewhat different rôle in general public opinion and practice. Whatever differences may exist in the powers which the states *may* exercise over different subjects, the powers which they *do* exercise are everywhere substantially the same. That the maintenance of such a condition of things is at present the wisest policy for the nation will be doubted by no one. Time, however, may change all this. The differentiation of interests in the vast region covered by the states may bring about a situation in which the welfare of the whole will be best subserved by an unequal distribution of powers among the parts. When that time comes, the theory of equal states will disappear as did that of state-sovereignty, and possibly with as tremendous a convulsion.

WM. A. DUNNING.

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THE SUSPENSION OF HABEAS CORPUS DURING THE WAR OF THE REBELLION.

THERE are several writs of *habeas corpus* known among lawyers, and they are used for various purposes. But when people speak of the writ of *habeas corpus* without more, they mean the great writ *ad subjiciendum*, the bulwark of liberty, the great writ of liberty, as it is called. It is the writ which is applied for when a man is supposed to be unjustly held in custody, and when it is issued and served, the person holding the prisoner must bring him before the judge and show cause for the detention. If the detention cannot be justified the prisoner will be discharged. The object of *habeas corpus* is to inquire into the legality of imprisonment, whether it is by competent authority and for a sufficient reason; and according to the evidence given at the hearing, the prisoner is either discharged, bailed, tried, or remanded to custody.

From a political point of view, the great value of *habeas corpus* is that it protects citizens from a dangerous tendency which is generally found in those who exercise the powers of government. These rulers of men often want to rid themselves quickly of their personal enemies or of those whom they choose to consider the enemies of their country, and one of the easiest methods is to arrest on any sort of charge or suspicion, and keep the victim in confinement simply by not allowing him to be brought to trial. And it has often been said, — and the Bastile and the Tower of London will warrant the assertion, — that the power secretly to hurry a man to jail, where his sufferings will be unknown or soon forgotten, is more dangerous to freedom than all the other engines of tyranny. On the other hand, it is generally admitted that when a government is attacked by a rebellion it is impossible for it to protect itself from conspirators and assassins if every one of them has to be taken before a court of law and proved guilty

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beyond a reasonable doubt. In such a crisis some arbitrary power must be given. The sovereign, whether king, president, or legislature, must be allowed to arrest on suspicion, without giving reasons; and in doing this, to preserve the balance between the liberty of the citizen and the safety of the government is one of the great problems of political science.

Whether it is the President or Congress that has power under the constitution to suspend the privilege of the writ of *habeas corpus* was a burning question during the civil war. When Lincoln became President in the spring of 1861 he found the Southern states in rebellion against the general government, and to subdue them and bring them back into the Union he conceived to be the duty of his office. Against the enemy in the rebellious states he employed the army and the navy, and against those individuals who in the North gave aid and comfort to the enemy and plotted to betray the government he employed the power of arrest and imprisonment. Like many others who have been placed in a similar predicament he found that the procedure of the courts was insufficient. There were men in Baltimore, Philadelphia and New York, in the cities of the West, in the departments at Washington, and in the White House itself who were ready and eager to hand over the government's property and strongholds to the rebels, and had laid their plans with that intent. Their schemes must be forestalled, their conspiracy killed before it blossomed. But none of them could be convicted by a court of law until they had committed an overt act. If arrested on mere suspicion they would be promptly discharged by a *habeas corpus*. The remedy for this state of affairs is to get rid of the troublesome writ; and this Lincoln proceeded to do. He began to arrest, without any warrant from a magistrate and usually by a military officer, those whom he suspected of treasonable designs, and he instructed the officers who had the prisoners in charge to disregard any writ of *habeas corpus* that was issued to them and to say that he had suspended it.[1] The case of John Merryman, one

[1] It was on the 27th of April, 1861, that Lincoln addressed to General Scott his first suspending order:

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of these prisoners, was the first to come up for judicial interpretation. Merryman lived near Baltimore, and appears to have been suspected of being captain of a secession troop, of having assisted in destroying railroads and bridges for the purpose of preventing troops from reaching Washington, and of obstructing the United States mail.[1] By order of General Keim of Pennsylvania he was arrested at night in his own house, and taken to Fort McHenry at that time in command of General George Cadwallader. Taney, who was then Chief Justice of the United States, granted a *habeas corpus*, but Cadwallader refused to obey it, saying that the privilege had been suspended by the President. On the return of the writ, the Chief Justice filed an opinion denying that the President had any power to suspend *habeas corpus* and affirming that such power rested with Congress alone. Lincoln continued to arrest and imprison without any regard to this opinion, and indeed was advised by his Attorney-General that he was not bound to notice it.

Thus far Lincoln had suspended the writ merely by orders to his officers to disregard it. On the 24th of September, 1862, he made use of more formal proceedings and suspended it by proclamation. On March 3, 1863, an act of Congress was passed giving the President discretionary power to suspend the writ during the continuance of the rebellion.[2] The writ of

"You are engaged in suppressing an insurrection against the laws of the United States. If at any point on or in the vicinity of any military line which is now or which shall be used between the City of Philadelphia and the City of Washington, you find resistance which renders it necessary to suspend the writ of *habeas corpus* for the public safety, you personally or through the officer in command, at the point at which resistance occurs, are authorized to suspend the writ.

ABRAHAM LINCOLN.

By the President,

WM. H. SEWARD, *Secretary of State.*"

Similar orders were afterwards issued for other places.

[1] Merryman was soon discharged. For an account of the charges against him I am indebted to one of his counsel, Mr. George M. Gill of the Baltimore Bar.

[2] 12 U. S. Statutes at Large, 755. By the second section of this act the Secretary of State and the Secretary of War were required to furnish the Federal judges with lists of the prisoners, their residences, places of confinement, and places where their offences were committed. When a grand jury of any of the courts having jurisdic-

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habeas corpus was therefore not suspended by Congress until the rebellion was half over. In other words, Lincoln suspended it for two years of his own accord and without authority from any one; for two years he made arrests without warrants and held men in prison as long as he pleased. The first arrests were caused by the attempts of the Baltimoreans to prevent Northern troops from reaching Washington, and by the fear that Maryland would secede. The Mayor and the police commissioners of Baltimore, many members of the Maryland legislature, newspaper editors, and other persons of distinction and influence were given lodgings inside of Fort McHenry and Fort Warren. Afterwards, executive arrests were made all over the country, especially in the West. An order, issued August 8, 1862, authorized marshals and chiefs of police to arrest any one who discouraged volunteer enlistments, gave aid or comfort to the enemy or indulged in any other disloyal practice. Discouraging enlistments and disloyal practices were offences unknown to the law; and the phrase disloyal practice was large enough to include anything.

There are few things in American history more worthy of discussion than the power exercised by Lincoln in those two years. It was absolute and arbitrary and, if unauthorized, its exercise was a tremendous violation of the constitution. Whether it was justifiable and necessary is another matter. If it was unconstitutional and yet necessary in order to save the Union, it shows that the constitution is defective in not allowing the government the proper means of protecting itself. That Lincoln used this power with discretion and forbearance there is no doubt. He was the most humane man that ever wielded such authority. He had no taste for tyranny, and he knew the temper of the American people. But, nevertheless, injustice was sometimes done. His subordinates had not always their master's nature; they sometimes indulged their malice; they sometimes arrested without excuse, and were

tion of any of the prisoners had terminated its session, those who stood unindicted were to be brought before the judge to be discharged if they would take the oath of allegiance.

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sometimes brutally severe in the arrest. Such things are perhaps inevitable when a great rebellion is to be subdued; but we must regret that they happened in America.

The constitution contains one short paragraph about *habeas corpus* and not a word more: —

> The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

This passage occurs in the first article which is devoted to the legislative power; and up to the time of the rebellion it was the general opinion that Congress alone had the right to suspend. When Lincoln and his Attorney-General claimed the power for the President, nearly everybody was surprised and many were shocked. They had supposed that the question was a settled one. When Aaron Burr and his conspiracy became so formidable as to suggest the suspension of *habeas corpus*, Jefferson, who was then President, submitted the whole matter to Congress, claiming no right for himself, and in the discussion which followed no one suggested that the President might exercise the power. When the state conventions were adopting the constitution the *habeas corpus* clause was never mentioned without it being taken for granted that Congress alone could suspend, and some thought that the debates of the convention which framed the constitution showed that such was also the opinion of the fathers of the republic. More conclusive than all, was the position of the clause itself. It occurs in the article devoted to the legislature and contains no words giving power to the executive, while the article devoted to the executive, where mention of the power would naturally be made if it belonged to the President, is entirely silent on the subject. The constitution uses the word suspend. No law can be suspended except by the legislature. The writ of *habeas corpus* is a law; for it is created by act of Congress, and therefore Congress alone can suspend it. In England, Parliament, and not the Crown, suspends the writ, and the makers of our constitution would naturally have followed the English custom,

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or having it before their eyes would certainly not have made the American President more powerful over civil liberty than the English King. Moreover, authority had spoken. Story in his Commentaries[1] gives the power to Congress, and Chief Justice Marshall in deciding Bollman's case[2] incidentally expressed himself as of the same opinion.

A few months after the publication of Taney's opinion in Merryman's case a remarkable pamphlet appeared. It was by Horace Binney, for many years the leader of the Philadelphia Bar, and at that time retired from practice and in his eighty-second year. Before Binney's pamphlet appeared Lincoln's action had of course been discussed in the newspapers. Of those who supported the President, some maintained that as commander-in-chief of the army and navy he had the implied right to suspend *habeas corpus*; others held that in a rebellion he could declare martial law, which, as it destroyed all civil authority, would easily dispose of the writ. Binney took an entirely new view of the subject. He believed that the President could of his own motion suspend the writ; but he refused to regard such suspension either as the lawful exercise of the military power of the commander-in-chief or as an incident of martial law. He did what no one else had attempted. He took the plain words of the constitution and deduced from them an intention to confer the power of suspension on the President.

The constitution, he said, provides that in cases of rebellion or invasion, when the public safety requires it, the privilege of the writ of *habeas corpus* may be suspended. That is to say, the people of the United States have declared that this great privilege may under certain conditions be denied or deferred, for a season. The constitution authorizes this to be done, but does not expressly authorize any department to do it. The

[1] Sect. 1342.

[2] *Ex parte* Bollman, 4 Cranch, 75, 95, 101. Bollman was arrested for participating in Burr's conspiracy.

Besides Story and Marshall there are some minor authorities to the same effect. Hurd, Habeas Corpus, 133, 134; Johnston *vs.* Duncan, 1 Martin (La.), 157; 2 Tucker's Blackstone, 134, note; Sheppard, Constitutional Text Book, 143.

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department to which the duty falls must be discovered by the delineation and attributes of the departments as laid down in the general scheme of the constitution. All the conditions of the exercise of the suspending power, described in the *habeas corpus* clause, are of executive cognizance, namely, rebellion or invasion, and the requirement of the public safety. The direction of a war, whether of rebellion or invasion, is necessarily with the executive. The suspension of *habeas corpus* is an instrument for repelling invasion or rebellion, and so its use must lie with the President.

It is true, he went on, that in England Parliament alone may suspend. But this English analogy is misleading. The American and English constitutions are very different. By the English constitution, Parliament, being omnipotent, may suspend the privilege of *habeas corpus* at any time, even in time of profound peace, and has in our own day suspended it during labor riots. The American constitution confines the suspension to rebellion or invasion. The unlimited power of suspension allowed in England would undoubtedly be dangerous in the hands of one man, but not so the qualified power of our constitution. Again, it must be observed that in England the privilege of *habeas corpus* is given, without qualification or exception, by an act of Parliament, and nothing but a subsequent act of Parliament can suspend or abridge it. But in America a single clause of the constitution recognizes the privilege and at the same time allows its suspension on certain occasions. The suspending clause in the American constitution stands in place of both the enabling and the suspending act of the English Parliament. In other words, America has a written constitution which cannot be changed by Congress, and England has an unwritten constitution which can be changed at the pleasure of Parliament. If there were in England some law higher than Parliament which said that *habeas corpus* could be suspended only in rebellion or invasion, and it could be shown that under this law it was the practice for Parliament alone to declare the fact of rebellion or invasion and the fact of public danger, then

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there might be an analogy. But comparing the two constitutions, as they actually exist, there is none. Our *habeas corpus* clause is entirely un-English because it restrains the legislative power as well as all other power, and it is thoroughly American because it is conservative of personal freedom and also of the public safety in the day of danger.

There is still another particular in which we must guard against analogy. The motive of the English people in putting the *habeas corpus* power entirely within the control of Parliament was their jealousy of the Crown. Before the time of Charles II., the King had often atrociously abused the power of arrest and acted in utter disregard of the privilege of *habeas corpus*. It was the dread of such behavior of their monarchs, who at that time still retained a great deal of their arbitrary power, which aroused the English people to pass the great *habeas corpus* act. But the framers of our constitution had no such fears of the President. The powers of his office had been substantially settled before the *habeas corpus* clause was proposed, and there was nothing in those powers to excite alarm. They had given him no power which he could abuse or enlarge except with more danger to himself than to the country. Elected for only four years, unable to veto a law if two-thirds of each house are opposed to him, unable to make a treaty unless two-thirds of the Senate concur, or to appoint a minister, consul, judge, or any officer but inferior ones without the advice and consent of the Senate, commander of the army and navy but unable to arm a soldier or build a ship unless Congress consent, commander of the militia but only when Congress has called them into service, unable to adjourn Congress except when they disagree as to the time of adjournment, and impeachable for any misconduct in office: — such is the array of our President's powers, and distinguished foreigners[1] have remarked that he is probably the feeblest executive ever known in a civilized community.

The history of the clause in the convention that framed the

[1] De Tocqueville and Bulwer Lytton.

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constitution shows strongly the intention of that body. Shortly after the convention met, Pinckney of South Carolina presented what he called "A plan of a Federal Constitution." The sixth article, which was concerned with the legislature, contained the following sentence:

> The legislature of the United States shall pass no law on the subject of religion, nor touching or abridging the liberty of the press; nor shall the privilege of the writ of *habeas corpus* ever be suspended except in case of rebellion or invasion.

Habeas corpus was not mentioned again until three months afterwards, and about three weeks before the final adjournment of the convention. Pinckney was again its guardian and moved, not the adoption of his plan, but a number of propositions to be referred to the committee of detail. He gave the *habeas corpus* proposition the following form:

> The privileges and benefits of the writ of *habeas corpus* shall be enjoyed in this government in the most expeditious and ample manner; and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding —— months.

Evidently, Pinckney intended the legislature to suspend. But it is important to observe that in his first motion he confined suspension to rebellion or invasion, and in his second to the most urgent and pressing occasions, and for a limited time. That is to say, in his second motion he left suspension to the discretion of the legislature provided that the suspension did not last longer than a certain number of months. If this last proposition had been adopted, our constitutional provision for *habeas corpus* might have been somewhat like England's; and of course, if such indefinite power to suspend was given, it was right to place it in the hands of Congress, and not in the hands of the executive. The meagre account which Madison has given of the convention's debates furnishes little or nothing more to guide us, until we find that a few days afterwards Gouverneur Morris disposed of the whole question. He moved that:

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The privilege of the writ of *habeas corpus* shall not be suspended, unless where (when) in cases of rebellion or invasion the public safety may require it.

With the substitution of the word when for where, which was probably done by the committee on style, this is the clause as it now stands in the constitution. The convention rejected Pinckney's English view. They limited suspension to conditions which were of executive cognizance, and therefore the reference to Congress became unnecessary, and was abandoned. All reference to the legislature is left out, and as moved by Morris and adopted by the convention this clause was not part of the legislative article, but an amendment to the fourth section of the eleventh article, which treats of the judiciary. Subsequently the committee on style and arrangement placed it in its present position. The duty of that committee was not to change the meaning of any phrase; they were confined strictly to such work as their name implies. By placing the provision in the judiciary article, the mover and the convention may have intended to admonish the judges of a restraint upon their power over the writ. But however that may be, certain it is, that they must have intended to expressly negative Pinckney's idea of a suspending power in Congress.

The committee on style probably placed the clause in the ninth section of the first article because that section is restrictive throughout. Most of the paragraphs restrain Congress, but one of them restrains the executive department, and another restrains all persons who hold an office of trust or profit under the United States. Position in the ninth section is therefore of no avail to give authority to Congress. Nor can position in the first article be used for such a purpose. The first article is not confined to Congress. The tenth section of it contains prohibitions on the states, and the seventh section gives the President the power of veto. In like manner, the judiciary article is not confined to its title, but gives Congress the power to declare the punishment for treason. Several of the powers of Congress are also enumerated in the fourth article. The argument from position proves nothing. The power given by

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the suspending clause is left to the department which by the general theory of the constitution has charge of the public safety in times of rebellion or invasion.

If instead of using the word privilege, the clause had spoken of the writ of *habeas corpus* or of a *habeas corpus* act, there might be ground for arguing that a writ or an act being created by legislative power may be suspended only by the same. But the privilege being spoken of, — the privilege of being bailed, tried or discharged, — an arrest and detention, which is exclusively an executive function, is enough to suspend the privilege, and no legislative act is necessary. The clause does not give power to authorize suspension, it gives power actually to suspend. The clause itself contains all the authority. If it had given some department the right to authorize suspension, the authorization might be a legislative act, but the right actually to suspend is executive. No legislative body can suspend the privilege by an act on the person to be affected, and they never attempt it. Parliament never actually suspends *habeas corpus*. They authorize the crown or ministry to do it as the occasion arises. That is all that Congress could do, namely, give effect to the action of the President or some one else, and that the constitution does already.[1]

Binney attempted to show, that no authority to any department could be inferred from English analogy, or from the position or wording of the clause, and that suspending the privilege was naturally an executive act. Whether it is an executive act under the constitution depends somewhat on the question, which department has the duty of ascertaining the conditions of rebellion or invasion and the requirement of public safety. Binney argued that it was clearly the executive. It is his duty faithfully to execute the laws and to protect the constitution.[2] He is commander-in-chief of the

[1] The *Habeas Corpus* act of Congress, passed March 3, 1863, supports this reasoning. The first section provides that "during the present rebellion the President of the United States, whenever in his judgment the public safety may require it, is authorized to suspend the writ of *habeas corpus*," *etc.*

Congress does not attempt to suspend but authorizes the President to do so.

[2] Const. Art. 2, sec. 3, "He shall take care that the laws be faithfully executed."

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army, navy and militia, and if the laws or the constitution are menaced by an invasion or rebellion, it surely belongs to him to decide the fact, to measure the danger and what the public safety requires. If it is his duty to execute the laws and defend the constitution he must have the right to determine when the facts exist which bring his duty into operation. The suspension of *habeas corpus* is most effective when used quickly in the beginning of an outbreak or conspiracy. Congress can never use it quickly and is often not in session.

This was Binney's argument in support of Lincoln. Such a powerful handling of the subject could not be disregarded. Answers and criticisms came from all sides. He seemed, as he himself said, to have flushed and put upon the wing a whole covey of reviewers.[1] Some of them were anonymous, and some had difficulty in finding a printer, for in those days the expression of an opinion, even in the North, would sometimes result in social ostracism, and there was also an apprehension that perhaps the mob might take part in constitutional discussions.

The foundation of Binney's argument was that the *habeas corpus* clause, even if expressed in the form of a restriction, implied a grant. It restricted suspension to certain conditions, and at the same time granted power to some department to suspend when those conditions were fulfilled.[2] This was also the underlying principle of Chief Justice Taney's opinion,

Const. Art. 2, sec. 1, "Before he enter on the execution of his office, he shall take the following oath or affirmation: —'I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.'"

[1] I have been able to find about forty pamphlets written during the war on the *habeas corpus* question. Besides these there are newspaper and magazine articles and the speeches in the Congressional debates. The pamphlets can be seen in the Philadelphia libraries, in the Public Library of Providence, and in the Boston libraries. The library of Cornell University has also a good collection. There are, doubtless, other collections, private and public, which have not come to my knowledge.

[2] He said the clause was elliptical. When the ellipsis was supplied it would read thus: The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it; *and then it may be suspended.*

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although he differed from Binney in regard to the department to which the grant was given. Most of the pamphleteers who answered Binney attacked him at this point. They took the ground that if there had been no *habeas corpus* clause Congress would have had the unlimited right to suspend, and therefore there was no need of reading a grant into the clause, which, as its words implied, was a restriction and nothing more. If it can be shown that the clause is a restriction without a grant, it is at once fatal to Binney's whole chain of reasoning. For if the power to suspend could exist without the clause it would be an unlimited power, and no one would think of arguing that the convention would have given it to the President. In fact, one of Binney's own arguments was that if the power was unlimited it would be dangerous to give it to the President, and that the clause gave it to him because its use was strictly limited to the conditions of rebellion and invasion. If the constitution without the clause gives an unlimited power to some department to suspend, and the clause is simply a restriction on that power, the department intended to wield the power and to be subject to the restriction can be none other than Congress.

One of the reviewers, Judge Nicholas of Kentucky, put the question thus:[1] Suppose, said he, the constitution had no *habeas corpus* clause and was entirely silent about the writ and its suspension, where then would be the power to suspend? It would be of course with Congress. Congress would have untrammelled discretion over the writ and could suspend it or repeal it out of existence. It was this full power, this full discretion, which the convention intended to restrain, and accordingly they made the *habeas corpus* clause restrictive. It does not grant power to suspend, for Congress had that already; but it says that the privilege shall not be suspended except in certain cases. The words of the clause are entirely restrictive and contain no implication of a grant. They presume the existence of something which they restrain. Moreover, as was pointed out by Randolph in the Virginia convention, Congress was

[1] Habeas Corpus. The Law of War and Confiscation. By S. S. Nicholas, Louisville, 1862.

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specifically given the right to suspend *habeas corpus*, when it was given the right to regulate the courts, out of which the writ issues. The *habeas corpus* clause is an exception to this power.

Binney wrote another pamphlet in reply to this reasoning. He showed what is very evident, namely, that to suppose the constitution silent and infer from that the right of Congress to suspend was mere assertion and a begging of the question. More than that, it was contrary to the most fundamental principle of constitutional law. No powers can be assumed for any part of the government. Nothing is so well settled as the doctrine that Congress has only the powers which are expressly given by the constitution and such other instrumental and incidental powers as are necessary to carry the expressed powers into effect. Ours is a government of enumerated and limited powers, and the powers not mentioned in the constitution are reserved to the states or to the people. It is monstrous to assert that a power exists simply because the constitution says nothing about it. By that reasoning Congress would be omnipotent. It is equally useless to contend that the *habeas corpus* clause is a restriction on the power of Congress to regulate the courts. Congress has no such power. It is true that it can regulate the appellate jurisdiction of the Supreme Court, and decide on the number of inferior courts, but that is all. The constitution says:

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

And again:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, *etc.*, *etc.*

The constitution has therefore vested the judicial power in certain courts. Congress has a discretion as to the number and order of the inferior courts, but it has no discretion whatever as to vesting or not vesting the whole judicial power in courts of some description. The language of the constitution is manda-

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tory. It does not say the judicial power may be vested, but it says it "shall be vested." Congress could not lawfully refuse to create courts of some sort; it could not lawfully refuse to create the means for the exercise of that power which the constitution says shall exist. To suppose that the obligation is not binding, but might at pleasure be declined, is to suppose that under the sanction of the constitution Congress may defeat the constitution. The constitution creates the judicial power, and declares to what questions it shall extend. Congress creates only the instruments which are to use that power; and when thus created the whole judicial power attaches to them, and cannot be diminished or changed by Congress.[1] By the constitution the judicial power extends to questions of personal liberty, and its exercise in that respect cannot be interfered with by Congress.

Congress, having the right to establish the tribunals, must give to them such an organization as will enable them to exercise completely the judicial power created by the constitution. A tribunal is not constituted unless it is endued with the active powers necessary to the exercise of its jurisdiction. The mere erecting of a court by name and the vesting of jurisdiction in it would amount to nothing. It must have the practical powers of bringing parties before it, enforcing its decrees, and issuing writs. It is idle to argue that the withholding or suspending of the writ of *habeas corpus* is an appropriate means of constituting a judicial tribunal. It is a caricature of argument to say, that Congress must create a court in which the whole judicial power is to vest, and at the same time may withhold from that court any of the instruments necessary to the practical exercise of judicial power. Accordingly, the act[2] which established our courts says, that they "shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and

[1] This reasoning is supported by the decision in Martin *vs.* Hunter, 1 Wheaton, 304. See also Story, Constitution (3d ed.), sec. 1590.

[2] Sept. 24, 1789.

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usages of law." Courts cannot exist without writs, and Congress has given such as were necessary. Can it be contended that they could now cripple the courts by taking away the writ of *habeas corpus?* If they could take away *habeas corpus* they could take away all the other writs, which would in effect be a failure to constitute the tribunals.[1]

Even supposing that Congress had the arbitrary power of withholding or repealing the writ, that would not be the same thing as suspending the privilege of it. If the courts were denied the power to issue the writ, that would simply be a denial to the prisoner of his specific remedy, but the principle, the right, the privilege, whereof the constitution speaks, would still remain. The constitution says, the privilege shall not be suspended except in rebellion or invasion. It speaks only of the privilege, and says nothing of the remedy. Congress might tamper with the remedy indefinitely, and yet be far outside the language and meaning of the *habeas corpus* clause. The fact that Congress gives the courts a *habeas corpus* writ has nothing to do with suspending the privilege of personal liberty guaranteed by the constitution.

Binney was perhaps successful in answering this objector; but there were others with whom it was harder to deal. Like Nicholas, they took the ground that if the clause were absent Congress would have the right to suspend; but they drew the authority to suspend, not from the power to regulate the courts, but from the power of Congress to suppress insurrection and repel invasion. One of them, George M. Wharton, took a wider range.[2] He quoted the clauses of the constitution

[1] Nicholas replied to this part of Binney's argument. He said, that whether it was obligatory on Congress to establish inferior courts was a doubtful question, and admitted to be such by Story. Congress, as was well known, had not yet given to the inferior courts the whole judicial power of the constitution. Congress once abolished the whole batch of inferior courts, and established new ones. In the interval between the repealing of the old and the establishing of the new could the old judges have exercised their powers on the ground that the repealing act was void? The duty of Congress to establish such courts was a moral, not a constitutional duty. Habeas Corpus. A Response to Mr. Binney, by S. S. Nicholas, Louisville, 1862; Story, Const., sec. 1593.

[2] Remarks on Mr. Binney's Treatise on the Writ of Habeas Corpus. By George M. Wharton, Philadelphia, 1862.

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which gave Congress power to declare war, make rules concerning captures, raise and support armies, call out the militia, and make all laws which shall be necessary and proper for carrying these powers into execution, and said that the right to suspend could be implied from any one of them or from all of them together, and that the *habeas corpus* clause was simply a restriction on the power thus implied. Binney answered this by saying that it was too much at large, too indefinite. None of the powers contained any reference to the writ or even to the judicial department. He had already maintained that Congress could not impair the judicial department after it had once been created, and surely a right to impair an express provision of the constitution could not be implied from the war powers. Suspension of *habeas corpus* was a matter of municipal law, was not of the nature of military force, could not be identified with it, and could not be implied from it. If it could be implied from the power to call out the militia, or from any of the other war powers, it could be implied still more easily from the power to punish counterfeiting, for it would certainly be very useful against that offence.

But Wharton wrote another pamphlet[1] in which he fortified his argument admirably, and relied on the doctrine of the implied powers of Congress. This doctrine has been extended until it means that any act of Congress is constitutional which has such a relation to one or more of the expressed powers of Congress as in any way or under any circumstances to promote their efficiency. We hesitate to admit that the power to suspend *habeas corpus* may be implied from the right to make war, because it seems like such a great and substantial power that its authority ought to rest on something stronger than an implication. But in McCullough *vs.* Maryland the power of Congress to charter a bank was implied from the powers to collect taxes, borrow money, regulate commerce, declare war, and raise and support armies. Congress also has by implication the right to define and punish crimes; and the famous embargo

[1] Answer to Mr. Binney's Reply to "Remarks" on his Treatise on the Habeas Corpus. By George M. Wharton, Philadelphia, 1862.

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act which by prohibiting vessels from leaving port practically destroyed commerce was said to be a natural incident of the power to regulate commerce. The whole question of *habeas corpus* hinges on this doctrine of implied powers. Congress may do all things necessary and proper to put down a rebellion, and if the suspension of *habeas corpus* is necessary and proper for that purpose, then Congress and not the President may suspend. Binney never answered these statements, and it is doubtful if they can be answered.

The argument against Binney amounts to this: If there were no *habeas corpus* clause the right to suspend could be implied from the war powers of Congress, therefore it is unnecessary to read a grant into a clause which is expressed in the form of a restriction, and so the clause is simply a restriction on the implied right of Congress to suspend. Then it is an undoubted fact that the state conventions when adopting the constitution supposed that the suspending power had been given to Congress alone. This of itself is almost enough to settle the question. What was intended by the convention which framed the constitution is of comparatively little importance. That convention was simply offering a constitution, and their opinion about it could not bind the people. But the state conventions were accepting, ratifying, and creating the constitution, and what they understood it to be is almost decisive. When we add to this the fact, that up to 1861 all authorities agreed in ascribing the power to Congress, we have an argument which even the marvellous ingenuity of Binney cannot overcome.

It is curious that in spite of the great importance of the *habeas corpus* question, very little is said about it in the debates of the convention which framed the constitution and it is hardly referred to in *The Federalist*. The people of that day were easily excited on the subject of liberty, and Binney suggests, that the Fathers said as little as possible about it, because they were afraid of arousing a discussion which would interfere with the adoption of the constitution. The addition of two or three words to the *habeas corpus* clause would have put the matter beyond the peradventure of a doubt, and their failure to do this

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is hard to understand. Gouverneur Morris was the author of the clause as we now have it, and a chance passage in one of his letters has raised a suspicion that that adroit gentleman intended the *habeas corpus* clause to be exactly what it is, — a masterpiece of vagueness.[1]

Besides Binney's argument there were three others which supported the President. One of them was by Attorney-General Bates.[2] He said, that in time of rebellion the President has a right to arrest and imprison such persons as he suspects of holding criminal intercourse with the enemy. He has this right because by his oath he has sworn to preserve, protect and defend the constitution; and Congress has confirmed him in this by those statutes which give him the use of the military power when the combinations are too powerful to be suppressed by judicial proceedings. It is his bounden duty, therefore, to put down insurrection, and Congress has given him the means and instruments which he may use at his discretion. If the insurgents assail with an army, he may find it best to use the army against them. If they employ spies and emissaries, he may find it necessary to arrest and imprison them. Having thus arrested and by this right, he is not bound to obey a *habeas corpus* issued to him by a court. The departments of government are independent of each other. Each has its own sphere. The President's duties are political; those of the courts are judicial. If in time of a rebellion the President arrests a man, it is a political act, not within the domain of the courts, and they cannot interfere with it. They cannot revise or reverse his political decisions. Can it be said, that after the President has conquered the insurgent army and arrested their emissaries, he is bound to

[1] "Having rejected redundant and equivocal terms I believe it to be as clear as our language would permit, *excepting, nevertheless, a part of what relates to the judiciary*. On that subject, conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases, which, expressing my own notions, would not alarm others, nor shock their self-love; and, to the best of my recollection, this was the only part which passed without cavil." Spark's Life and Correspondence of Gouverneur Morris, vol. iii, 322. See Third Part, The Privilege of the Writ of Habeas Corpus under the Constitution. By Horace Binney, page 21.

[2] 10 Opinions of Attorney-General, 74.

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bring their bodies before any judge who may send him a writ of *habeas corpus*, and submit to whatever the judge shall see fit to order? Bates said he felt so sure of the power of the President, that he argued about *habeas corpus* only out of deference to the opinions of others; that he thought it no more necessary to suspend *habeas corpus* in order to enable the President to arrest spies[1] than to suspend the writ of replevin before seizing the arms and munitions of the enemy.

His reasoning is peculiar. He begins by assuming the proposition which has to be proved. He argues that the President has the power to suspend because he has the power to arrest and imprison. But the right to arrest is derived, if at all, from the right to suspend. It is impossible to reverse the order; for the privilege of *habeas corpus* is intended to be a protection against arrest and imprisonment by the sovereign. Again, he derives the right to arrest and imprison from the oath to preserve and defend the constitution. An oath cannot contain a grant of power which conflicts with other parts of the constitution, and the grant would in this case conflict with the provision declaring that no citizen shall be deprived of life, liberty or property without due process of law, and also with the provision which forbids arrests except by sworn warrants on probable cause. The only exception allowed by the constitution to these two provisions is when *habeas corpus* is suspended. Arrest and imprisonment derive their validity from suspension.[2] The right to arrest and imprison is the thing to be proved. His final assertion, that when the President has arrested an emissary it is a political act and cannot be interfered with by a department

[1] Bates uses the word spy all through his argument, but not I presume in its technical sense. There is no doubt that persons technically spies may be dealt with by the laws of war; they are outside of the pale of the civil law. Bates uses the word in a broad sense and means by it a citizen who remains at home and gives aid to the enemy. What to do with such persons was one of the great problems of the civil war.

[2] It was disputed during the war whether the President would have the right to arrest even when *habeas corpus* was suspended. Some said he would not, because it would violate the constitutional provisions about seizures and searches, due process of law and arrest warrants. They thought that when Congress suspended *habeas corpus* another act should be passed, giving the President the right to arrest. Suspen-

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whose duties are judicial, is the most barefaced assumption that ever was heard of. What is *habeas corpus* for, what is all the talk about liberty for, if not to check these political acts of the ruler?

It remains to notice the two other views in support of the President's power. One declares that suspension of *habeas corpus* is an incident of martial law, the other that it is one of the implied rights of the commander-in-chief when engaged in putting down a rebellion. Martial law is best defined by distinguishing it from military law and military government. Military law is the code of rules and regulations for the government of the officers and enlisted men of the army, and applies to no others. Military government is the government by a military officer of a conquered foreign province where the local law has been overthrown. It applies to all the people in the province, but is supposed to last only until civil law can be re-established. Martial law is military government at home. It is the government by a soldier of the citizens of his own country. If an American general should invade Canada, conquer it, and govern its inhabitants, that would be military government.[1] If an American general in command of a district which included Ohio should undertake to govern the citizens of that state and to punish them for what he deemed to be crimes and offences, that would be martial law. Martial law is therefore the good pleasure of a soldier administered to the citizens of his district. It is the arbitrary will of one man; it overthrows all the civil law and of course suspends *habeas corpus*. Lincoln declared martial law in several parts of the country. If he had a right to declare it, *habeas corpus* was thereby suspended wherever such law extended.

sion gave him merely the right to detain, not the right to arrest. This seems to have been the opinion in Jefferson's time. Binney argued that if the President could, either by his own authority or by grant of Congress, suspend, he could at the same time arrest, because suspension must necessarily and by implication include the right to arrest. This is apparently the modern view, as supported by the practice of Congress and the decision in Milligan's case. *Ex parte* Milligan, 4 Wallace, 137.

[1] General Scott maintained military government in Mexico for a short time after the conquest.

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When the war was over the Supreme Court decided, in Milligan's case,[1] after the most solemn argument and deep consideration, that the President could not declare martial law in any district not invaded by the enemy and where the judges were on the bench and the courts of law in operation. Martial law exists where there is a battle. It exists in a community where war exists and the courts and civil authorities are overthrown. A commander at the head of his army may impose it on states in rebellion, to cripple their resources and quell the insurrection. But it never exists where the courts and civil authorities are performing their normal functions. It prevails on the actual theatre of war because it is the only law there; the other law has been destroyed. Beyond these instances it cannot be created, except perhaps by an act of Congress.[2]

The decision in Milligan's case has played havoc with the theories that prevailed during the war. Lincoln maintained that any one who injured the efficiency of the military power could be seized by that power, tried by a military commission and, if necessary, hanged.[3] It was quite generally believed among ardent Unionists, that martial law followed the army; that the right to carry on war being given to the government, all things necessary to make the war successful were implied.[4] Undoubtedly when the Union armies captured a soldier of the Confederacy or an inhabitant of the Confederacy who was aiding the rebellion, such person was a prisoner of war, and could be held in confinement without a trial until the war was over, or he was exchanged. No one disputed that people who injured the government's military force in this way could be seized by the army wherever found. But suppose a man who had never been in

[1] *Ex parte* Milligan, 4 Wallace, 2.

[2] *Ex parte* Milligan, *supra*; *In re* Kemp, 16 Wisconsin, 359.

[3] Greeley, American Conflict, vol. ii, 493.

[4] William Whiting's pamphlets on War Powers, Military Arrests, *etc.* maintained these views. They passed through numerous editions and must have had a great influence. They have been called strong, but they are strong only in the sense of being dogmatic. They are now published in book form. Their author served during the war without pay as solicitor to the War department.

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Confederate territory, who had never joined the Confederacy and who had no connection with it except by sympathy, should, in a loyal Northern state of which he was a citizen, persuade soldiers to desert, combine with others to liberate prisoners, to resist the draft, and to seize the arms and munitions in the arsenals, what name was to be given to this species of traitor? Beyond question he was injuring the military force of the government, and injuring it more thoroughly than if he were an armed Southern soldier. Could he be seized by the army and under martial law dealt with as the commander or a military tribunal saw fit? or must he be simply arrested and turned over to the courts and the ordinary procedure of law? This was Milligan's case. He was a citizen of Indiana, a state within the military district of General Hovey, but at that time not invaded by the enemy, or at most only threatened with invasion, and with courts of law and all the machinery of civil government in full operation. Milligan believed in the Southern cause, but he did not care to join the Southern army and carry a musket or wear a sword. He found he could do better at home; and he used his best energies to injure the National government and the Northern army, and belonged to a secret society devoted to that purpose. There is reason to believe that he and some others, belonging to the order of American Knights or Sons of Liberty, had formed a conspiracy to release the ten thousand Rebel prisoners in Indiana, supply them with arms from the Federal arsenal, and use them to conquer the state and take it over to the Confederacy. He and his accomplices were in communication with the enemy, and indulged freely in the usual disloyal practices of the party to which they belonged. It was a case which seemed to justify the argument, that whoever aids the enemy is an enemy, and may be dealt with by the army. A conspiracy by Northern men in the North certainly seemed to be as much an act of hostility as an open attack by armed Southern men from the South. It was hard to say to the army which Milligan attacked, that, because he was not a soldier and because he stood on loyal soil and by accident of birth and residence was a citizen of a loyal state, they could not touch him. It was equiva-

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lent to saying that a citizen may take advantage of his citizenship and of the protection of his government to conspire against it. After they had caught this arch-traitor, tried him by a military commission and sentenced him to be hanged, they thought it a strange thing to be told that all their proceedings were void and that he must be allowed to go free. But that is what the Supreme Court decided and it is the law if the constitution is to be followed.

Milligan, though reeking with treason and rebellion, could not be taken as a prisoner of war. He was unfortunately a civilian and a resident of a state which was not the theatre of actual warfare, and in which the courts of law were wide open. All the offences of which he was accused were forbidden by law and could be punished by the courts.[1] *Habeas corpus* was at that time suspended by act of Congress. He might, therefore, have been arrested and held in custody to prevent his taking part in the conspiracy, and finally turned over to the courts for trial and punishment. But to seize him, try him, and condemn him by a military commission violated three or four provisions of the constitution. First of all, the constitution says, that "The trial of all crimes except in cases of impeachment, shall be by jury." Again, "No person shall be held to answer for a capital or otherwise infamous offence unless on presentment by a grand jury, . . . nor be deprived of life, liberty or property without due process of law." The sixth amendment declares that, "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed," and goes on to describe further formalities for such a trial. When used to deal with offences which can be tried in courts, martial law and military commissions violate every one of these provisions. The constitution says that no man may be tried and punished except by a jury and due process of law. If the courts are open, and opportunity given for jury trial and due process of law, the constitution must be obeyed, and it is absurd to say that martial

[1] 4 Wallace, 58, 122.

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law may exist. When the courts are overthrown and there is no chance for jury and due process, then martial law exists by necessity. Necessity creates an exception to the rule of the constitution, and the constitution itself creates another exception by allowing the suspension of *habeas corpus*. But it is to be observed that the suspension of *habeas corpus* gives the power to arrest and hold, but not to try and punish.

There have been attempts made to weaken the authority of Milligan's case, but they are of little avail.[1] It is a decision which can stand severe criticism. It received all the light that advocates could give. Of the nine judges who composed the court at that time all but one were Northern men and five of the nine had been commissioned by Lincoln. They were on the side of the President and their political belief inclined them to support his views of martial law. Chase, the Chief Justice, went so far as to say, that, whether martial law was constitutional or not, it was at any rate sanctified by having had Lincoln's approval. Probably the whole court would have been content if the soldiers in Indiana had succeeded in disposing of Milligan; and if all the Milligans in the country had been dealt with in a similar way the grief of the learned court would not have been great. But they were Americans, and when called upon to be lawyers and judges they set aside their feelings and stood by the law and the constitution.

One of the best arguments in favor of martial law was made by Attorney-General Speed.[2] He was asked by President Johnson, at the close of the war, whether the accomplices of Booth in the assassination of Lincoln should be tried by the civil courts or by a military commission under martial law. He decided in favor of the military commission and based his opinion on the clause in the constitution which says that, "Congress shall have power to define and punish piracies, *etc.*, and offences against the law of nations." The law of nations, he said, is by

[1] See an ingenious argument by Bishop in his work on criminal law, vol. i, sec. 64, note; also Whiting's War Powers, page 460.

[2] 11 Opinions of Attorney-General, 297.

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the constitution a part of the law of the land. As the laws of war constitute part of the law of nations they must also be part of the law of the land, and must exist whenever there is war and be binding on the citizens and the government. Congress may declare war, and when declared, it must be carried on according to its own peculiar laws. By the laws of war the army may capture the soldiers and sailors of the enemy, and, if accused of offences against the laws of war, try and punish them. The army may also capture guerillas, marauders, banditti, spies and other secret or open enemies, try and punish them according to the laws of war. Booth, he thought, was a secret enemy of the government, and his accomplices could accordingly be tried by a military commission. He avoided the constitutional provisions in regard to due process of law and jury trial by saying that the constitution gives the government power to carry on war, and therefore when war comes, the laws of war come with it and are exceptions to those provisions of the constitution. He also had to avoid the argument that the laws of war must, like the rest of the laws of the land, be subject to and modified by the constitution, and this he did by saying that the constitutional provisions for jury trial and due process refer only to crimes, whereas the clause of the constitution on which he relied, speaks of "offences against the law of nations." If an act were a technical crime according to statute or common law it was of course to be dealt with by the judiciary. But if an act were an offence against the law of nations it belonged to the jurisdiction of the army and its military tribunals. If this were not so, every soldier who killed an enemy in battle would be guilty of murder and would have violated the constitution, for he would have deprived a person of life without due process of law. So any one who holds a prisoner of war, is depriving him of liberty without due process of law. And if the army capture a spy and hang him, they are depriving him of life without due process of law, and also of the privilege of trial by jury. But all these acts are lawful because done under the laws of war. They belong to the jurisdiction of the laws of war and have nothing to do with jury trial and

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due process. The constitution has established the laws of war and also the rule of jury trial and due process, and has assigned to each its own sphere and domain.

The answer to this reasoning brings us back again to the Milligan case. If a man commit an offence which is cognizable in a court, and the courts are open, he must be tried by a court and due process of law, for the simple reason that the constitution commands it. Undoubtedly the constitution provides for carrying on war, and war is to be waged according to the laws thereof. Undoubtedly there are acts, such as killing and capturing the enemy, which are lawful only under the laws of war, and undoubtedly there are offences which are purely offences against the laws of war and cannot be punished by the courts. The trial and punishment for spying, breaking parol, breaking a blockade, violating a flag of truce, uniting with guerillas and bush-whackers, belong entirely to the military. But proving that the laws of war apply to these does not prove that the laws of war apply to offences for which a remedy is provided in the statute book. If the constitution says that no one shall be deprived of life, liberty, or property without due process of law, must not that provision be obeyed whenever it is possible to obey it? Although the constitution provides for war, the war cannot be carried on so as to violate other parts of the constitution. The constitution gives us power to deal with the enemy by the laws of war, but it does not give us power to administer the laws of war to our fellow-citizens. Every offence which can be tried in a court must be tried there, and an offence which cannot be tried in a court, and is purely military, may be left to the army. An offence which is both an offence against the laws of war and a crime triable in court should go to the court, for the command of the constitution is express in this respect and the right of trial by the laws of war is, at best, only implied. Neither the law of nations nor the laws of war can be allowed to overcome, within our own territory, the express words of the constitution. The constitution is the supreme law of the land, and no outside influence or outside law can be paramount to it. The laws of war as laid down by Vattel and

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other European writers may, perhaps, be liberally construed and administered in monarchical countries, but in a country with a written constitution giving only limited powers to the government, they must yield to the constitution and suffer change whenever they contradict it.

Booth murdered Lincoln, declaring that it was for the good of his country, and he was hunted down and shot as he deserved; but his accomplices were tried by a military commission. Guiteau murdered Garfield, saying that it was for the good of his country, and he was tried by the ordinary process of the law. There is no difference between the two cases. They are both crimes triable only in court.

A discussion of martial law is never complete until General Jackson's declaration of it at New Orleans is mentioned. After he had fought and won the battle of New Orleans and knew, though not officially, of the ratification of the treaty of peace, he undertook to govern the city by martial law. The excuse he gave was that the enemy, though beaten, were still in the neighborhood and might return, that the knowledge of peace had demoralized the militia under his command, and brought the whole city into a state of turbulence. Jackson always believed that the salvation of the country depended on his being absolute master of every one about him, and this trait had probably as much to do with the declaration of martial law as any difficulty or danger in his situation. A certain Louallier thought his conduct illegal, and was bold enough to say so in print. He was immediately arrested. Judge Hall of the United States district court issued a *habeas corpus* for his release, and Jackson, being determined to strike at the root of the matter, arrested the judge. Afterwards, when the judge got back into his court, he called Jackson before him and fined him a thousand dollars for contempt. Jackson promptly paid the fine, and after many years it was refunded to him by act of Congress. In passing the act some of Jackson's friends justified him on the ground of necessity which, they maintained, always decided the right or wrong of martial law. Others did not seem to care whether his act was legal or not; he was a grand old

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hero, they said, and had conquered the British. Some admire Jackson because in spite of law and at the risk of his reputation he acted for the safety of his country. Others admire Judge Hall, because he upheld the dignity of the law against the despotism of a soldier. The precedent has become a most valuable one, for it can be cited on both sides. It is like the other instances of martial law in America. In the Revolution, Gage, the British general at Boston, declared martial law five days before the battle of Bunker Hill, and even his own countrymen thought it outrageous. An attempt was also made to declare it in Virginia during the Revolution, and nearly everybody thought it was outrageous.[1] The Declaration of Independence says that it was outrageous for the king to make the military superior to the civil power; and many of the state constitutions have said that the military shall never be superior to the civil power. Everything is against martial law, and yet whenever a president, king, or general is driven to extremities he will make use of it, and those who complain will complain in vain. He who declares martial law has already an army with which to enforce his decrees. After the emergency is past, if he has been successful and has not been cruel or reckless in its use, he will, in all probability, be forgiven; and the American people are among those most likely to forgive.[2]

And now suppose it to be proven that the President cannot lawfully suspend *habeas corpus* without authority from Congress, what have we gained? Very little. The fact remains, that for two years Lincoln suspended the writ, and arrested the enemies of the government as freely as if the right had been expressly given him.[3] People who objected were allowed the privilege of

[1] Washington fought the seven years of the Revolution to a successful end, and never made use of martial law at all.

[2] The other theory giving the President power to suspend *habeas corpus* was advocated by Reverdy Johnson of Baltimore. He maintained that the President could suspend in time of war as an incident of his office of commander-in-chief of the army and navy. The power to wage war implied, he said, the power to suspend the ordinary securities of liberty and property. But it is easy to see that this argument of Johnson's is nothing but martial law in a new form. It is simply a trick to get rid of the odious name of martial law by calling it commander-in-chief.

[3] The fact also remains that our liberties are unimpaired. The Union is restored, and life, liberty and property are as safe to-day as they were before the war.

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complaining. Some wrote learned pamphlets against him, some passed resolutions, and judges filed indignant opinions. They might have spared themselves the trouble. Lincoln never ceased to use his great power, but he used it without tyranny or cruelty. The great mass of the loyal people either thought he was right or forgave him his wrong. Most of them sympathized with his pathetic exclamation, "Are all the laws but one to go unexecuted and the government itself to go to pieces lest that one be violated?" The man who saved the Union in the war of the Rebellion, and the man who shall hereafter save it in some other war, will never be held to a very strict account for violations of the constitution. Events are stronger than the constitution and stronger than constitutional law. What the people permit to be done in violation of the constitution may by continual repetition become part of the constitution. The acquisition by treaty of the Louisiana territory was admitted by its advocates to be unconstitutional; but the people consented to it, and also to subsequent acquisitions, and no one now thinks it worth while to argue against them. May it be said that the consent of the people has given the President power to suspend *habeas corpus?*

The English nation has had great experience with the *habeas corpus* question, and it is good proof of the wisdom of their law that Lincoln's method was in almost exact accordance with it. Since the time of William III. it has been the custom in England for the ministry, when the emergency arises, to arrest and hold in defiance of the writ, and afterwards ask Parliament for an Act of Indemnity. The reason is obvious. If they waited to get a bill through Parliament the conspiracy or rebellion might become successful, or, as was the case with ours, gain such headway as to be difficult to subdue. Parliament moreover might not be in session. It was the prompt action of the ministers of the crown that saved the life of William III., and Parliament not only indemnified them, but thanked them for it. Lincoln found himself face to face with a rebellion, and Congress not in session. He called out the militia, increased the army and the navy, and suspended *habeas corpus.* After-

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wards in his message to Congress he submitted all his acts to their judgment. They supported him as far as they could. A bill was passed August 16, 1861, making valid all his acts in regard to the army, navy and militia, and giving them the same effect as if they had been done under the previous authority of Congress.[1] About the same time a joint resolution was introduced in the Senate making valid his suspension of *habeas corpus*, but though much debated it never reached a vote.[2] Afterwards in December, 1862, the House of Representatives passed a bill indemnifying the President for previous suspensions of *habeas corpus* and giving him authority to suspend in the future.[3] The Senate would not agree to the clause making valid the previous suspension, and the bill finally passed both houses with that clause omitted and became known as the *Habeas Corpus* Suspension act of March 3, 1863. Both President and Congress, driven by the necessities of a state of rebellion, followed the English practice as closely as circumstances would allow. But there was this difference. If the President had violated the constitution, Congress could not make his acts valid. There is no power in Congress to excuse violations of the constitution. Even the elastic war powers cannot be stretched to that extent.

It might be well therefore if Binney's argument were the true one. It is the only one that, under the present wording of the constitution, can by any possibility give the power to the executive. It gave him during the Rebellion at least a claim of right, and was adopted and repeated in the speeches of all the Republican leaders. The *habeas corpus* clause as now understood stands in the way of the government's protecting itself. In such a case we want something more than a claim of right. Violations of the constitution demoralize the people and abate their reverence for the great charter; but violations will surely come if such provisions are to remain. Every man thinks he

[1] 12 U. S. Statutes at Large, 326.

[2] Introduced July 6, 1861, and debated at various times until August 6, of the same year, when the Senate adjourned.

[3] Introduced December 8, 1862.

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has a right to live and every government thinks it has a right to live. Every man when driven to the wall by a murderous assailant will override all laws to protect himself, and this is called the great right of self-defence. So every government, when driven to the wall by a rebellion, will trample down a constitution before it will allow itself to be destroyed. This may not be constitutional law, but it is fact.

SYDNEY G. FISHER.

LIST OF PAMPHLETS, ETC., ON THE HABEAS CORPUS QUESTION, PUBLISHED DURING THE WAR.

1. Decision of Chief Justice Taney in the Merryman case, upon the Writ of Habeas Corpus, published by authority, Philadelphia, John Campbell, Bookseller, 419 Chestnut St., 1862. (Same reported in Taney, 246.)

2. Habeas Corpus. The proceedings in the case of John Merryman of Baltimore County, Maryland, before the Hon. Roger Brooke Taney, Chief Justice of the Supreme Court of the United States, Baltimore. Published by Lucas Brothers, 170 Baltimore St., 1861.

3. Suspension of the Writ of Habeas Corpus. Letter from Attorney General transmitting his opinion. Printed by order of House of Representatives.

4. The Privilege or the Writ of Habeas Corpus under the Constitution. Second Edition, Philadelphia; C. Sherman & Son, Printers, 1862. By Horace Binney.

5. Second Part. The Privilege of the Writ of Habeas Corpus under the Constitution. Philadelphia, John Campbell, Publisher, 419 Chestnut St., 1862. By Horace Binney.

6. Third Part. The privilege of the Writ of Habeas Corpus under the Constitution, Philadelphia. Sherman & Co., Printers, 1865. By Horace Binney.

7. A review of the Argument of President Lincoln and Attorney General Bates in favor of the Presidential Power to suspend the Privilege of the Writ of Habeas Corpus. By S. S. Nicholas of Louisville, Ky. Printed by Bradley & Gilbert, Cor. First and Market Sts., 1861.

8. Habeas Corpus. A Response to Mr. Binney, by S. S. Nicholas, Louisville. Printed by Bradley & Gilbert, 1862.

9. Martial Law. By S. S. Nicholas, part of a pamphlet first published in 1842 over the signature of A Kentuckian. Philadelphia, John Campbell, Bookseller, 419 Chestnut St., 1862.

10. A Review of Mr. Binney's Pamphlet on "The Privilege of the Writ of Habeas Corpus under the Constitution." By J. C. Bullitt, Philadelphia, John Campbell, Publisher, 419 Chestnut St., 1862.

11. Remarks on Mr. Binney's Treatise on the Writ of Habeas Corpus.

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By G. M. Wharton. Second Edition, Philadelphia, John Campbell, Bookseller, 419 Chestnut St., 1862.

12. Answer to Mr. Binney's Reply to "Remarks" on his treatise on the Habeas Corpus. By Geo. M. Wharton, Philadelphia, John Campbell, Bookseller, 419 Chestnut St., 1862.

13. Authorities cited Antagonistic to Horace Binney's Conclusions on the Writ of Habeas Corpus. By Tatlow Jackson: John Campbell, Bookseller, 419 Chestnut St., Philadelphia, 1862.

14. An Undelivered Speech on Executive Arrests. Philadelphia, 1862. By Charles Ingersoll.

15. Personal Liberty and Martial Law. A Review of some Pamphlets of the day. Philadelphia, April, 1862. By Edward Ingersoll.

16. The Writ of Habeas Corpus and Mr. Binney. Second Edition: Philadelphia. John Campbell, Bookseller, 419 Chestnut St., 1862. By John T. Montgomery.

17. Reply to Horace Binney on the Privilege of the Writ of Habeas Corpus under the Constitution. By a member of the Philadelphia Bar. Philadelphia, James Challen & Son, Publishers, 1308 Chestnut St., 1862. (Author, David Boyer Brown.)

18. A reply to Horace Binney's Pamphlet on the Habeas Corpus. Philadelphia, 1862. Anonymous. (Author, C. T. Gross(?).)

19. The Privilege of the Writ of Habeas Corpus under the Constitution of the United States: In what it consists. How it is allowed: How it is suspended: It is the Regulation of the Law, not the Authorization of an exercise of Legislative Power. John Campbell, Bookseller, 419 Chestnut St., Philadelphia, 1862. Anonymous. (Author, Wm. M. Kennedy(?).)

20. A Treatise on the Law of the American Rebellion and our true Policy, Domestic and Foreign. By Daniel Gardner, Jurist. Author of Gardner's Institutes of International, Inter-State and American Public Law, and member of the New York Bar: New York, John W. Amerman, Printer, No. 47 Cedar St., 1862.

21. Presidential Power over Personal Liberty. A Review of Horace Binney's Essay on the Writ of Habeas Corpus. Imprinted for the Author, 1862. Anonymous. (Author, Isaac Myers.)

22. The Suspending Power and the Writ of Habeas Corpus. Philadelphia: John Campbell, Bookseller, 419 Chestnut St., 1862. Anonymous. (Author, James F. Johnson.)

23. The Habeas Corpus and Martial Law. By Robert L. Breck. Prepared for the Danville Quarterly Review for December, 1861, Cincinnati: Richard H. Collins, Printer, 25 West Fourth St., 1862.

24. Speech of Hon. Samuel Shellabarger of Ohio on the Habeas Corpus: Delivered in the House of Representatives, May 12, 1862, Washington: Printed at the Congressional Globe Office, 1862.

25. Speech of Hon. Lazarus W. Powell of Kentucky, on Arbitrary Arrests, in reply to Mr. Wright of Indiana: In the Senate, January 19, 1863. Washington, Printed at the Congressional Globe Office, 1863.

26. The Habeas Corpus. The benefit of the Writ of Habeas Corpus is

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naturally suspended until granted, and the suspension is lawful until made unlawful. Anonymous. (Author, William Kennedy(?).)

27. Opinion of Judge N. K. Hall of the United States District Court for the Northern District of New York on Habeas Corpus in the case, Rev. Judson D. Benedict; and Documents and Statements of Facts relating thereto, Buffalo: Joseph Warren & Co., Printers, Courier Office, 178 Washington St., 1862.

28. Military arrests in Time of War, by William Whiting, Washington, Government Printing Office, 1863. (Afterwards incorporated in the Author's Volume on War Powers.)

29. Habeas Corpus and Martial Law. A Review of the Opinion of Chief Justice Taney, in the case of John Merryman. By Joel Parker, Second Edition. Published by Authority, Philadelphia, John Campbell, Bookseller, 419 Chestnut St., 1862.

30. Martial Law: What is it and Who can Declare it? By Tatlow Jackson; Philadelphia, John Campbell, Bookseller, 419 Chestnut St., 1862.

31. Our National Constitution: Its Adaptation to a State of War or Insurrection. Philadelphia, C. Sherman, Son & Co., Printers, 1863. By Daniel Agnew.

32. Executive Power. By B. R. Curtis, Boston, Little, Brown & Co., 1862.

33. The Power of the Commander-in-Chief to Declare Martial Law, and Decree Emancipation. As shown from B. R. Curtis. By Libertas, Boston: A. Williams & Co., 100 Washington St., 1862. (Author, Charles Mayo Ellis.)

34. The Trial of the Constitution, by Sydney George Fisher. Philadelphia, Lippincott & Co., 1862. (Treats incidentally of the *habeas corpus* question.)

35. Habeas Corpus, Facts, and Authorities on the Suspension of the Privilege of the Writ of Habeas Corpus.

36. War Powers of the General Government: Who made the War? The Right to Suspend the Writ of Habeas Corpus, &c., &c. By Anna Ella Carroll of Maryland. Washington, printed by H. Polkinton, 1861.

37. Reply to the speech of Hon. J. C. Breckenridge, delivered in the United States Senate, July 16, 1861, and in defence of the President's War Measures. Suspension of the Writ of Habeas Corpus, &c., &c. By Anna Ella Carroll of Maryland. Washington, printed by H. Polkinton, 1861.

38. The Southern Rebellion and the Constitutional Powers of the Republic for its Suppression. By Henry Winter Davis, New York, Published by E. D. Baker, 1862. (Pulpit & Rostrum, No. 24.)

39. Military Despotism! Suspension of Habeas Corpus! Curses coming home to roost, New York, 1863. (Loyal Publication Society, No. 20.)

40. War Powers of Congress and of the President. An address delivered before the National Club of Salem, March 13, 1863. By Joel Parker, Cambridge, H. O. Houghton, 1863.

41. The Trial of Clement L. Vallandigham by a Military Commission, and the Proceedings under his Application for a Writ of Habeas Corpus in the Circuit Court of the United States for the Southern District of Ohio. Rickey & Carroll, Cincinnati, 1863.

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42. The Trials for Treason at Indianapolis, disclosing the place for establishing a North Western Confederacy. Being the Official Record of the Trial before a Military Commission, &c., &c. Edited by Ben Pitman, Recorder, Cincinnati. Moore, Wilstach & Baldwin, 1865.

43. The following are newspaper and magazine articles relating to the subject.

Abstract of Lectures by Prof. Parsons of the Harvard Law School, in *Daily National Intelligencer* for June 7, 1861, and in *Boston Daily Advertiser* for June 5, 1861.

Reverdy Johnson's Argument in favor of the right of President as Commander-in-Chief to Suspend Habeas Corpus, in *Daily National Intelligencer* for June 22, 1861.

Articles in 9 *American Law Reg.* (O. S.) 504, 705.

S. G. F.

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THE CONSTITUTIONS OF THE STATE OF NEW YORK. I.

AT the outbreak of the Revolution, the political interests of the people of the united colonies were entrusted to a Continental Congress, and provisional governments for the preservation of order were established in the separate colonies, to continue until the differences with the mother country should be adjusted. Originally, none of the colonies seems to have contemplated permanent separation from the British government. The provisional organizations thus established were necessarily ephemeral, although, from the exigencies of the times, they necessarily wielded great powers.

Whether the Union is older than the states or whether the states preceded the Union, is a much debated question. It may with certainty be affirmed that the Continental Congress gave the initiative to the establishment of nearly every state government. The earliest recommendations for the formation of state governments, came in response to requests to Congress from New Hampshire and Massachusetts, which were advised by Congress to form constitutions. In May, 1776, when it had become evident that a declaration of independence could not long be delayed, the Continental Congress passed a resolution, which, after an appropriate preamble, recommended to the several assemblies and conventions of the united colonies, where no government sufficient to the exigencies of their affairs had been created, to adopt such government as should, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.

The congress in New York, questioning its power, without popular consent, to make a constitution for the state, acting upon the resolution of the Continental Congress, recommended to the electors in the several counties either to authorize their

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present deputies or to elect special delegates, to take into consideration the necessity and propriety of instituting such new government as was recommended by the Continental Congress; and, if deemed best, to institute and establish such government, to continue until future peace with Great Britain should render the same unnecessary.

The Constitution of 1777.

Pursuant to the latter recommendation, elections were held at which delegates to the first constitutional convention of the state were chosen. The convention assembled at White Plains on July 9, 1776, — New York city, the first place selected for its sessions, having then fallen into British hands. It was soon forced by the British from White Plains, and completed its work at Kingston, on April 20, 1777.

The convention numbered some of the greatest names in New York's revolutionary annals: John Jay, to whom a large part of the first constitution has been ascribed, Robert R. Livingston, Gouverneur Morris and James Duane.

There were few models to follow and improve, in fact, the work of framing a fundamental law for the state may fairly be said to have been undertaken in an almost unexplored field.

The constitution embraces the Declaration of Independence and the resolutions of the Continental and of the Colonial Congress. It then bases itself upon the proposition that no authority shall be exercised over the people of the state but such as shall be derived from and granted by them. This democratic platform is not fully borne out in the constitution itself, nor was the work of the convention submitted to the people for their ratification.

The convention provided for a bi-cameral legislature consisting of a senate and assembly, or house of assembly as it is also called, which were to convene once at least in every year for the dispatch of business. The assembly was to consist of seventy members elected annually in the several counties of the state in proportions fixed by the constitution. The qualifications of electors of assemblymen differed from those of electors

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of senators. To be eligible to vote for an assemblyman it was necessary that the citizen offering his vote should have resided in the county six months immediately preceding election day, and also that he should be a freeholder possessing a freehold of the value of twenty pounds within the county of his residence or the lessee of a tenement of the yearly value of forty shillings. Any elector qualified to vote for an assemblyman was eligible to the office.

The basis of suffrage in the election of senators was much less democratic and selection to the senate was confined to fewer persons. The senate was to consist of twenty-four freeholders chosen by freeholders alone; and only such were entitled to vote as were possessed of freeholds of the value of one hundred pounds over all debts charged thereon. Senators were elected for four years and provision was made for the election of certain senators every year. The senate was divided into four classes of six each. The constitution ordained that at the first election six senators should be chosen to hold office one year, and a like number for two, three and four years, and that at each successive annual election one-fourth of the senate should be chosen. For the purpose of electing senators the state was divided into four great districts, and the constitution assigned to each district its number of senators. A majority of either house was to constitute a quorum, and each house was made the judge of the qualifications of its members, *etc.* The senate was restricted to a maximum of one hundred senators, and the assembly to a maximum of three hundred members. Provision was made for the taking of a census at the close of the war and at successive intervals of seven years afterwards, for the purpose of apportioning representation in the senate and the assembly according to the changing distribution of population throughout the state.

The supreme executive authority of the state was vested in a governor to be chosen every three years or as often as the seat of government should become vacant, by freeholders qualified to elect senators, and the election was to be held at the same time as the election of assemblymen. The constitution placed

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no limitations upon the choice of electors for the office of governor other than that the person selected should be "a wise and discreet freeholder." By virtue of his office he was general and commander-in-chief of the militia and admiral of the navy, was empowered to convene the legislature on extraordinary occasions, and to prorogue it from time to time for not more than sixty days in any year. His duties corresponded with the functions of the governor under the present constitution, with one or two important exceptions. Impelled by fear of one man power, so characteristic of that age, the framers of the constitution did not invest the governor with veto power, but, upon the suggestion of Robert R. Livingston, adopted the following article:

ARTICLE III: And whereas laws inconsistent with the spirit of this constitution or with the public good, may be hastily and unadvisedly passed: Be it Ordained, That the Governor, for the time being, the Chancellor and the Judges of the Supreme Court, or any two of them, together with the Governor, shall be, and hereby are, constituted a council to revise all bills about to be passed into laws by the Legislature. And for that purpose shall assemble themselves, from time to time, when the Legislature shall be convened; for which nevertheless they shall not receive any salary or consideration under any pretence whatever. And that all bills which have passed the Senate and Assembly, shall, before they become laws, be presented to the said council for their revisal and consideration: and if upon such revision and consideration, it should appear improper to the said council or a majority of them, that the said bill should become a law of this State, that they return the same, together with their objections thereto in writing, to the Senate or House of Assembly, in whichsoever the same shall have originated, who shall enter the objections sent down by the council, at large, in their minutes, and proceed to reconsider the said bill. But if after such reconsideration, two-thirds of the said Senate or House of Assembly, shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and if approved by two-thirds of the members present, shall be a law.

And in order to prevent any unnecessary delays,

Be it further ordained, That if any bill shall not be returned by the council, within ten days after it shall have been presented, the same shall be a law, unless the Legislature shall, by their adjournment, render

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a return of the said bill within ten days impracticable; in which case, the bill shall be returned on the first day of the meeting of the Legislature after the expiration of the said ten days.

The section of the constitution destined to exercise the most potent influence in the political history of the state was the provision for a council of appointment. This council consisted of the governor and four senators who were to be openly nominated and appointed by the assembly every year, one senator from each of the four senatorial districts; senators were not eligible to the council for two years successively. A majority of the council constituted a quorum. The governor had no vote, but had a casting voice in the event of a tie. The language of the article which created this irresponsible body was very vague, although the intention of those who drafted it probably was that the governor should nominate and, with the advice and consent of the council, should appoint all officers except those for whose appointment the constitution made other express provision. The whole power of appointment in the state was thus, with few exceptions, lodged in the governor and a council of four senators, two of whom, with the governor, virtually held the appointing power. An equally despotic power of removal was placed in the same hands. We of to-day, who have swung to the opposite extreme of electing all officers, with difficulty appreciate the vast extent of power vested in the council. Very few offices were made elective by the first constitution. Electors of certain qualifications voted for assemblymen, and a more restricted body of electors voted for senators and governor. Incumbents of all other offices, civil and military, including a large part of the judiciary, sheriffs, coroners, clerks, marshals, registers and notaries public, and even the mayors of cities were placed in power by the voice of the council of appointment.

Another peculiar feature of the constitution related to tenure of office. Almost all of the officers appointed by the council held their position during its pleasure.

The judiciary system was entirely different from that which has been familiar to us for forty years. The convention elected John Jay chief-justice, and Yates and Scott associate justices

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of the supreme court of the state, and Robert R. Livingston, chancellor. It placed in the new constitution a provision that the chancellor, the judges of the supreme court and the first judge of the county court in every county should hold their offices during good behavior or until the age of sixty years. While the constitution deprived the council of appointment of power to remove these judicial officers, they were by its own terms displaced at too early an age. Chancellor Kent was thus forced to retire from the bench at sixty, although, like the dramatist Sophocles, he wrote his crowning work at a much more advanced age.

The constitution forbade the chancellor and judges of the court holding any other office except that of delegate to the general Congress. It instituted a court for the trial of impeachments, and for the correction of errors. The impeachment court was similar to that which still exists. The court of errors was to consist of the president of the senate, the senators, the chancellor and judges of the supreme court, or a majority of them. In the event of an appeal from the decision of the chancellor, the chancellor was required to inform the court of the reasons of his decree, but was not to have a voice in the final sentence. The judges of the supreme court, when their decisions were under review, were also deprived of a vote for affirmance or reversal.

The constitution adopted the common law of England, the statute law of England and Great Britain and the acts of the legislature of the colony of New York in force on April 20, 1777, as the law of the state, declared all grants of land by the king of Great Britain after a certain date void, and assured to every one the free exercise of religion. It also ordained that as ministers of the gospel and priests were dedicated to the service of God and the cure of souls and ought not to be diverted from the great duties of their functions, no minister of the gospel nor priest of any denomination should be eligible to any civil or military office in the state.

One patent defect in the constitution was its failure to make provision for its own amendment. Like all the early state con-

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stitutions with the exception of that of Massachusetts, it was never submitted to the people nor ratified by them. It was merely adopted by the convention, which ordained that it should be the constitution of the state.

In April, 1801, the legislature passed an act by which it proposed to the citizens of the state to elect by ballot delegates to meet in convention

> for the purpose of considering the parts of the constitution of this State respecting the number of Senators and members of Assembly in this State and with power to reduce and limit the number of them as the said Convention might deem proper; and also for the purpose of considering and determining the true construction of the Twenty-third article of the Constitution of this State relative to the right of nomination to office.

The people selected delegates to the convention and the convention, without submitting any subject to the people for ratification, modified the constitution in the following particulars:

It declared that the number of members of the assembly thereafter to be elected should be one hundred and should never exceed one hundred and fifty, and that the legislature at its next session should apportion the said one hundred members of the assembly among the several counties of the state as nearly as possible according to the number of electors to be found in each county, as shown by the census directed to be taken that year. It fixed the membership of the senate permanently at thirty-two and, as the senate then contained a larger number of members, made appropriate provisions for vacating the seats of certain senators. It also ordained that the assembly should be increased at the rate of two members a year, until the maximum number (150) should be attained, and made provisions for future apportionments of senators and members of assembly.

The only other purpose for which the convention had been summoned, was to determine the true construction of that article of the first constitution which vested in the council of appointment the power of nominating and appointing most of the officials throughout the state.

The precise question submitted to the convention was: —

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Does the constitution clothe the governor with the sole right of nomination, or is that prerogative vested concurrently in all the members of the council?

The language of the article is certainly obscure, but for seventeen years the practice had been to consider the right of nomination as exclusively vested in the governor, with the right of confirmation in the whole council. But in 1794 a vacancy occurred in the supreme court. George Clinton, a Republican, was then governor of the state. A majority of the council were Federalists, and the Federalists were anxious to bestow the office on a judge of the Federalist faith. Accordingly one of the Federalist members of the council nominated Egbert Benson to the vacant office and his appointment was carried by a majority vote, despite Clinton's protest that the power to nominate belonged exclusively to himself.

After John Jay became governor of the state, the complexion of the council was so changed that the Republicans had a majority, and Jay, a Federalist, found himself in the same predicament in which Governor Clinton had been placed. DeWitt Clinton and Ambrose Spencer, then members of the council and in political accord, warmly insisted upon their right to nominate, which Jay as vigorously denied. These differences of opinion became so bitter and each side clung so tenaciously to its opinion, that Jay broke up the council and appealed to the legislature to determine the meaning of the constitution, but that body was either unable or unwilling to do so. DeWitt Clinton was one of the delegates to the convention of 1801 and there defended his action in the council of appointment, and won a majority of the convention to his views. Daniel D. Tompkins, then a young man, was also a delegate, but he argued that the exclusive power of nomination was in the governor. Had the construction that the governor alone was empowered to nominate been adopted, responsibility for bad nominations would have been fixed upon him, but the new interpretation exonerated him from all responsibility, for a nomination and appointment could be obtained not only without his aid, but even against his protest.

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Armed with this construction of the constitution, the council of appointment proceeded to an even more tyrannical use of its power. The constitution provided that new commissions should be issued to the judges of the county courts other than to the first judge, and to the justices of the peace, once at least in every three years. The council now concluded that new commissions might issue oftener, at its pleasure, because the maximum limit imposed by the constitution was three years. The result of this construction was that these judicial officers were removed as often as the political complexion of the council underwent a change, an event which might happen every year.

The vast powers of the council of appointment were too often employed for personal or party advantage, regardless of the public welfare. When the Republicans predominated in the council, they made a "clean sweep" of Federalists; and the Federalists turned out all Republicans as soon as the council fell into their hands. The whole official machinery of the state was controlled at Albany and every year witnessed a disgraceful scramble for office, the influence of which was felt from the capital to the remotest parts of the state. The irresponsible and despotic power of the council converted it into a great central machine, in absolute command of all political patronage, with its agents in every county. Those, who, like DeWitt Clinton, made the most remorseless use of the machine, suffered most from it, when it fell into the hands of their political enemies. Political enmity too often led to personal hatreds and, in more than one instance, to deadly feuds.

The Constitution of 1822.

The desire to abolish the council of appointment was one of the chief reasons for calling the convention of 1821. Public opinion had for several years demanded the abolition of this council and of the council of revision, and there grew up concurrently a strong desire for an extension of the right of suffrage. The legislature of 1820, accordingly, adopted a bill calling a convention and providing for the election of delegates. The bill was vetoed by the council of revision, Chancellor Kent writing

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the opinion, on the ground that a convention could not constitutionally be called, until the people had first decided that it should be held, and that the bill was also defective in not directing the separate submission to the people of all amendments which the convention might propose, the bill providing only for popular ratification or rejection as a whole.

On March 13, 1821, an act was passed, recommending a convention. The act provided that all free male citizens of twenty-one years and upwards who were freeholders, or paid taxes, or were members of the militia or of a volunteer corps, together with such as were exempt from taxation or militia duty, or who had been assessed or who had commuted for work on the public highways, should be allowed to vote by ballot for three days in the town or ward of actual residence, for delegates. The delegates were to be chosen the same as members of the assembly, from the cities and counties of the state. All voters for delegates were to be eligible. The convention was to submit its proposed amendments to the decision of the citizens of the state entitled to vote for delegates, together or in distinct propositions as the convention should deem expedient.

The law, it will be perceived, opened the convention to a larger number of citizens than were entitled to the suffrage under the constitution of 1777.

Four fundamental changes were wrought by the convention of 1821: 1, Abolition of the council of appointment; 2, Abolition of the council of revision; 3, Extension of the elective franchise; 4, Increase of the governor's powers.

First: The project of abolishing the council of appointment met with no opposition in the convention of 1821. The report of the committee upon the council shows how enormous was its patronage. Eight thousand two hundred and eighty-seven military and six thousand six hundred and sixty-three civil officers held their commissions from it and in most instances at will.

Second: The council of revision was abrogated. This council became unpopular during the war of 1812, for while the two houses of the legislature sought to uphold the arm of the Presi-

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dent and of Congress, the chancellor and the judges of the council were in sympathy with the Federalists and opposed to the war. The opprobrium which the vetoes of the council during this period brought upon it cannot be better described than in the language of Martin Van Buren, in an address to the convention of 1821, while the veto clause was under debate:

> The scenes which passed within these walls during the darkest period of the late war cannot be forgotten. It is well known that the two houses of the legislature were divided; while, in the one house we were exerting ourselves to provide for the defense of the country, the other house was preparing impeachments against the executive for appropriating money without law for the defense of the state. But the effort was unavailing. An election intervened and the people, with honorable fidelity to the best interests of their country, returned a legislature ready and willing to apply the public resources for the public defense. They did so. They passed a variety of acts called for by the exigencies of our country. But from the council of revision were fulminated objections to the passage of those acts — objections which were industriously circulated throughout the state, to foment the elements of faction. Beyond all doubt at that moment was produced the sentiment which has led to the unanimous vote to abolish the council. The legislature had exerted themselves in the public defense; and the object of these objections was to impress the public mind with a belief that their representatives were treading under foot the constitution and laws of their country. The public voice on that occasion was open and decided; and it has ever since continued to set in a current wide and deep against the council.

Mr. Duer, another member of the convention, described it as "an executive council of which the members hold their seats for life, and possess an efficient control over the acts and proceedings of your legislature."

Third: Next to the abolition of the council of appointment, the most important service rendered by the convention of 1821 was an extension of the right of suffrage. This was accomplished, first, by lessening the property qualifications established by the old constitution, and, secondly, by making the qualifications of electors of senators and governor the same as those of electors of assemblymen.

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The convention followed close upon the settlement of the controversy over the admission of Missouri into the Union, and a determined movement was made by some of the delegates, led by Peter A. Jay, to extend the right of suffrage to blacks upon the same terms as to white men. As this proposition met with great opposition, the decision of the convention was a compromise. All male citizens, of the age of twenty-one years, inhabitants of the state for one year preceding an election and for six months residents of a town or county, who, within the year, had served in the militia or paid a tax to the state or county upon real or personal property, were endowed with the right of suffrage. But it was provided, that no man of color should have a vote who had not been a citizen of the state for three years and for one year next preceding any election, and who was not the owner of a freehold estate of the value of two hundred and fifty dollars free and clear, upon which he had been rated and paid taxes.

In 1826 all property qualifications were abandoned, except in the case of colored citizens. It is a striking fact that, had the views of some members of the convention of 1821 prevailed, and colored citizens been denied the suffrage altogether, a privilege exercised under the old constitution by about thirty thousand colored citizens would have been taken away. Happily no such injustice was done. As Mr. Jay well said, the convention had been summoned to extend the franchise, — not to disfranchise anybody.

Under the first constitution the state presented the anomaly of colored men held in slavery and of free colored persons exercising the right to vote. Such an anomaly could not long be maintained, and before many years the legislature enacted a law giving freedom to every child born of a slave within the state after July 4, 1799, and to every slave born after that date elsewhere, but brought within the state by any person intending permanently to reside within the state. In 1817 a statute was passed declaring that every negro or mulatto born within the state before July 4, 1799, should be free after July 4, 1827.

One of the great battles in the convention of 1821 was over

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the proposition to make the qualifications of electors of the senate and governor the same as those of the electors of the assemblymen. In the first convention the great landed proprietors were all represented, and the constitution which was then framed retained the suffrage in the hands of the owners of large estates and of their tenants. As the landed interest was all powerful in the election of senators and of the governor, and as it had a predominant influence in the election of assemblymen, the council of appointment was naturally subservient to it. It was thus able not only to control the appointment of justices and the political patronage of the state, but also, through the council of revision, to possess a negative on all legislation adverse to its interests. As public opinion in 1821 required an extension of the suffrage, the landed proprietors foresaw that they would lose control of the assembly, but they desired to retain their influence in the senate. Chancellor Kent and Judge Spencer were the chief advocates of a restricted suffrage, and their views were ably and successfully contested by Erastus Root, Martin Van Buren and others. Had the election of senators been kept in the hands of the landed class, the tendency would have been strong to the enactment of class legislation and the establishment of class influence in the state. Chancellor Kent and Judge Spencer were unquestionably honest in their views; but, while their dislike of universal suffrage was unwarranted, it must be admitted even by the warmest friends of unrestricted suffrage that much of their fear was justified, and that we have yet to learn, particularly in cities, how to secure to the intelligent voter that proportion of influence which he ought to exercise.

Fourth: Another great achievement of the convention of 1821 was the modification of the position of governor. There is the greatest difference between the powers of the governor under the old constitution and under that of 1822. Under the first constitution as modified by the amendments of 1801, as also under the early constitutions of our sister states, he was divested of almost every power. Under the constitution framed in 1821 he was invested with the greatest powers which have

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ever been exercised by persons holding the office of governor, during the entire history of the state. He was then given a veto upon all legislation and, subject to confirmation by the senate, the right to appoint a large proportion of state officials including all judicial officers except justices of the peace. He was also clothed with the power to remove certain elective officers.

The veto and appointing power which was thus vested in the governor, rendered him so much more of a factor in politics than he had been under the old constitution, that the convention deemed it necessary to shorten his term of office so as to increase his responsibility to the electors of the state. Advocates of a three year term were not wanting, but the more conservative members, at the head of whom was Van Buren, favored a two year term on the ground that it gave the governor sufficient time to qualify himself for the administration of his office, and at the same time held him sufficiently accountable to the people. Under the constitution of 1777 any person could be governor if he were a freeholder. The convention of 1821 retained the freehold restriction, but limited the office to citizens of the United States of the age of at least thirty years, residents within the state at least five years prior to the election. But absence from the state during that period on business of the state or the United States was not to render a candidate ineligible.

In various other particulars, the constitution departed from the first form of government. The state was subdivided into eight senatorial districts, because the old districts were so large that their inhabitants were unable to vote intelligently for senators, inasmuch as it had often happened that men who were not well known in their communities received nominations, and in some instances votes sufficient to elect were cast, under a misapprehension as to the identity of the candidate. But, as formerly, all senators were required to be freeholders.

The convention enlarged the judicial force of the state, increasing the number of justices of the supreme court. It further provided for the subdivision of the state into not less

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than four, nor more than eight circuits, and for the appointment of circuit judges by the governor, subject to confirmation by the senate, who were to hold their offices by the same tenure as justices of the supreme court and who were clothed with the powers of supreme court justices at chambers, and at *nisi prius* and in courts of oyer and terminer. When the first constitution was framed, the English law of libel, which then became the law of the state, was extremely narrow and illiberal, making it the province of the jury simply to ascertain whether the so-called libel had been published, and leaving the question of the fact of libel to the court. Through the efforts of Erskine, Fox and Burke, the English law had been ameliorated, and a similar result had been achieved by Hamilton in this state. The convention of 1821, adopting the statute of 1805, provided that in all prosecution or indictments for libel, the jury were to be the judges both of the law and the fact.

The convention also rectified an omission in the first constitution by making specific provision for the amendment of the new. Only one mode of amendment, however, was then adopted. Amendments were first to be approved by a majority of the members elected to each of the two houses and then agreed to by two-thirds of all the members elected to each house of the succeeding legislature. They were then to be submitted to the electors qualified to vote for members of the legislature and, when ratified by a majority of the electors voting thereon, were to become part of the constitution.

Section 9, of Article VII, of the new constitution made the consent of two-thirds of the members elected to each branch of the legislature essential to the passage of every bill appropriating the public moneys or property for local or private purposes, or creating, continuing, altering or renewing any body politic or corporate.

This section records the first public victory in the state over the advocates of exclusive franchises to individuals or corporations. The triumph became more complete when provisions were inserted in the constitution of 1846 requiring banking and other private corporations to be organized under general laws,

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and forbidding the legislature to create corporations by special act, for other than municipal purposes.

At common law the exercise of banking powers was a universal right. The common law continued in existence in the state of New York until 1804. Between the date of the adoption of the first constitution and that year, very few bank charters were granted, owing to the reluctance of legislatures to consent to the issue of paper money, the evils of which had caused much suffering during the revolutionary period. In 1804, the legislature of New York made banking a franchise or privilege dependent upon its grant; and this unfortunate policy was continued in the state until the year 1838, when the incorporation of banks was provided for by general law.

While banking continued to be a legislative privilege, and, even before the act of 1804, when special charters were sought from the legislature, so bitter was the spirit of faction that charters were often refused to applicants whose politics differed from the politics of the majority of the legislature. Federalists refused Republican applications, and Republicans retaliated in their turn. In 1799, the Manhattan company, whose promoters were Republican, obtained a charter, ostensibly as a water company, but in reality merely for the purpose of carrying on a banking business. Increased water facilities were then sorely needed in the city of New York, and the incorporators presented at Albany a charter, skilfully devised by Aaron Burr, containing one subsidiary sentence, which gave the company permission to invest its surplus capital in any business not inconsistent with the Federal or state constitution. Had the applicants boldly requested a bank charter, their request would have been denied.

A few years later, a company of Federalists sought to charter the Merchants' bank, but the legislature refused to grant a charter, on the ground that the concession would be injurious to the Republican party. Such a proscriptive abuse of legislative functions impelled capitalists to the employment of corruption, as the only means left open for the attainment of their aims. Where partisanship and faction so degrading were exhib-

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ited, it was not surprising that bribery was found to be the only efficacious means of extorting favors from political adversaries. In 1812, the promoters of the Bank of America, who were Federalists, sought a franchise. The Republicans in the legislature opposed it on the plea that there were too many banks in New York city; but as the bank's agents had, by judicious distribution of stock, managed to get a bill through the legislature, despite charges of fraud, and, as it was popularly known that a majority of the council of revision, being Federalists, would approve the bill, Governor Tomkins prorogued[1] the legislature, alleging as the reason of his remarkable action, that it was openly asserted that legislators had been bribed to vote for the bill. The factions and corruptions engendered by controversies over bank charters led the convention of 1821 to adopt the section which has been cited, but, as Hammond says, the provision failed to remedy the evil; it simply required capitalists to buy up a larger number of members.

The convention of 1821 was an unqualified victory for popular rights. It sensibly impaired, although it did not destroy, the system of central government established by the old constitution. It enfranchised a large and deserving class of citizens; it made the governor a real power and differentiated the government more clearly into three departments, executive, legislative and judicial, all of which were fused under the first charter. It rendered the senate and the governor agents of the people as fully as the assemblymen. Although it retained the framework of the old judicial fabric, it increased the judicial force. It also incorporated into the organic law a fuller bill of rights. For the omnipotent council of appointment, it substituted a somewhat complex system of appointments, which had, at least, the merit of dispersing power. The secretary of state, comptroller, treasurer, attorney-general, surveyor-general and commissary-general were appointed by the senate and assembly, either by separate agreement or on joint ballot. Mayors of cities were chosen by the municipal common councils. Justices

[1] Probably the only occasion when the governor's power of prorogation was exercised. This power was taken away by the convention of 1821.

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of the peace became entitled to their commissions by analogous action of boards of supervisors and county judges, although in a few years (1826) these officers were made elective. Clerks of courts, other than county clerks, were appointed by the judges of their respective courts, and district attorneys were selected by the judges of the county courts, while sheriffs and county clerks were chosen by the electors of their respective counties but were removable by the governor, after an opportunity to be heard in their own defence.

The constitution submitted by the delegates was adopted by the people, as an entirety, in February, 1822.

While but two amendments had been made to the first constitution, ten separate propositions of amendment to the second constitution were at different times submitted by the legislature to the voters of the state, six of which were adopted. The most important were the amendment of 1826, abolishing all property qualifications for white voters; the amendment of 1834, giving the electors of the city of New York qualified to vote for other municipal officers, the right to vote for mayor, thus taking away from the common council of that city the appointment of that official; and the extension in 1838 of a like privilege to the voters in all the cities of the state.

The subject of the appointment of mayors of cities was brought before the legislature in 1831, and motions were made in the senate favoring the appointment of these officials by the governor, by the governor and senate and also by the legislature. William H. Seward, who was then a member of the senate from the old seventh district, vigorously opposed all these plans and argued that the qualified voters of the city of New York should elect the city's chief magistrate, and that a like right should be extended to the people of all the cities of the state.

The constitution of 1822 remained in existence for twenty-four years. During a large part of the time, the state enjoyed almost unexampled prosperity. Men of great ability and sagacity, most of whom afterwards acquired national reputation, filled its gubernatorial chair. Its judiciary numbered some

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of the most exalted names in the annals of its jurisprudence. The advancement of the state was, however, largely due to its canal system, which invited immigration, augmented the revenues of the state, imparted value to the land in its middle tier of counties, and summoned villages and towns into life. The Appalachian range, which in the states south of New York raises a barrier between the Atlantic ocean and the Mississippi valley, falls away to a level between Lake Erie and the Hudson river. That nature had made it possible for the Great Lakes and the Hudson river to be united by a canal through New York state, had impressed far-seeing men even in the last century, but it was reserved for DeWitt Clinton to give practical form to their ideas. Scarcely had the Erie canal become an accomplished fact before the idea of lateral canals intersecting the chain of lakes in the centre of the state was conceived, and acts were passed for their construction. After ten years of use it was found that the Erie canal needed enlargement and improvement; and, in 1835, a law went into effect which authorized the canal commissioners to make improvements in the canal, whenever and to such extent as they should deem desirable. The act clothed the commissioners with great, and perhaps questionable powers, but it was shorn of much of its danger, as well as its utility, by the clause which forbade the commissioners contracting for any improvements the cost of which could not be defrayed out of the surplus revenues of the canals. As the work of enlargement authorized by this act did not proceed with sufficient rapidity to satisfy public demands, the legislature of 1838 took the subject under consideration. The canal commissioners reported to the assembly of that year that, by an expenditure of about $12,500,000, the canal could be made seventy feet in width and seven feet in depth and supplied with adequate gates and locks. The legislature thereupon passed a bill which Governor Marcy approved, authorizing the commissioners to borrow $4,000,000 on the credit of the state for the enlargement of the canal. The act further directed the commissioners to prepare and put under contract, with as little delay as possible, such portions of the work as were mentioned

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in their report to the assembly and also such other portions as, in the opinion of the canal board, would best secure the completion of the entire enlargement with double locks on the whole line. Thus empowered, the canal commissioners made contracts, pledging the state treasury to an expenditure of about $12,500,000, nearly all of which sum was made payable before May 1, 1842. Laws were also passed during these years for improvements in the lateral canals, and the public credit was liberally extended to various railroad enterprises, among others, to the amount of $3,000,000, to the Erie railroad.

In the following year (1839), the canal commissioners were asked to revise their estimates and report again to the legislature. It was then discovered that the expenditure necessary to complete the improvements on the scale contemplated in their previous report had risen to $23,000,000, — double the original estimates; and that, with the other public improvements undertaken or assisted by the state, the state had involved itself in a possible indebtedness of $30,000,000. These facts were adverted to by Governor Seward, in his annual message to the legislature in 1840, 1841 and 1842, but, true to the policy of internal improvements of which he was a life-long advocate, the governor argued in favor of continuing the work which had been undertaken, but of keeping the expenditures therefor within an amount the interest upon which could be paid from the surplus revenues of the canals.

These events followed shortly upon the commercial panic of 1837. The credit of most of our sister states was then at the lowest ebb, and foreign confidence in all American securities was much weakened by the policy of partial repudiation which had been adopted in some of the states. The revelations of the canal commissioners had a disastrous effect upon the credit of New York. Its stocks rapidly depreciated, money could not be borrowed for public uses for long terms, and it was with great difficulty that temporary loans could be procured to meet even the most pressing emergencies.

In 1842, the Democrats secured the ascendency in the state legislature. The policy of their leaders was to retrieve the

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credit of the state by at once stopping all improvements and by levying taxes sufficient, with the canal revenues, to meet the yearly interest on the state debt and to provide for the yearly expenses of the state government. Under the leadership of Michael Hoffman a bill was passed through the legislature, known as the celebrated finance bill of 1842, to which the governor gave a reluctant approval.

The policy of this act, called also the suspension act, was summary. It put an end to further expenditures for improvements, by suspending all work on the canals, except such as was strictly necessary in order to preserve and render useful what had already been done. To meet the state's pressing necessities, it imposed a direct tax upon real and personal property, and authorized the issue of bonds and pledged the surplus canal tolls to the redemption of the canal debt. The action of the legislature soon effected a marked improvement in the credit of the state and in the value of its stock.

So long as the "pay as you go" policy of the act of 1842 was maintained, the completion of the contemplated enlargement of the Erie canal became practically impossible. It was not therefore long, before the Democrats began to divide upon the question of maintaining the act of 1842 in all its strictness. In 1844, the party was split into two factions; one branch, the radicals or "Barnburners," were for rigidly upholding the system of 1842 and applying all surplus tolls to the extinction of the public debt. The conservatives or "Hunkers" argued that the surplus should be devoted to the completion of the public enterprises which had been suspended by the act of 1842. But, whatever conflicting opinions were held as to the desirability of finishing the incomplete public works, public sentiment was awakened to the necessity of maintaining the policy of keeping part of the canal revenues pledged to the payment of the canal debt, and to the necessity of limiting the debt-contracting power of the legislature. Resolutions embodying these ideas were introduced into successive legislatures and barely failed of the vote required to permit their submission to the people.

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In 1845, the legislature approved a bill appropriating $197,000 from the revenues of the canals to various improvements in the Crooked Lake, the Genesee Valley, the Black River, and the Erie canals. The bill was in reality an effort to undermine the statute of 1842 and it therefore met with a prompt and emphatic veto from Governor Wright. The following portions of the Governor's veto message are quoted, because they serve to explain the circumstances which led to the convention of 1846:

> Another reason why I consider the present an unfortunate time to make this change of policy, is the evidence before us of a determinate disposition in the public mind to remodel our constitutional system, in reference to expenditures of this description. Ever since the prostration of the credit of the state in 1841, and the consequent suspension of the public works and establishment of the financial system adopted by the legislature of 1842, the attention of our people has been drawn to the necessity of some further constitutional protection against the danger of enduring debt and perpetual taxation. Extended discussion for two years resulted in action by the last legislature, originating and submitting to the people, previous to the last election, specific amendments to the constitution, taking two most important positions in reference to the further increase of our public debt for these objects, namely:
>
> 1. That no debt should be hereafter contracted for expenditures like these, until the law authorizing the loan should have been submitted to the people and expressly approved by them, by their direct votes at the polls and
>
> 2. That no law submitted to the people for their appropriation, should contain authority to make loans for but a single work or object of expenditure, and should contain irrepealable provisions for a sinking fund to meet the interest and pay off the principal of the debt within a specified period.
>
> This legislature, elected with reference to these provisions as amendments proposed to the constitution of the state, has expressed its sense, the one house by the constitutional vote of two-thirds, and the other by a majority in their favor, thus reflecting most truly, as I believe, the deliberate sense and wish of a majority of the people of the state. The propositions, however, having failed to receive the constitutional vote of two-thirds of the assembly, cannot be submitted to the people, according to the provisions contained in the constitution for its amendment and have therefore failed. This failure, together with that of other

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amendments similarly proposed and similarly failing, has secured the passage of a law for the call of a Convention of the people of the state to amend the constitution.

Believing that the convention would be held, the governor declared that the resumption of public works and the making of new contracts would embarrass its proceedings. The measure not receiving the requisite vote in either house to pass it over his veto, was defeated.

The Constitution of 1846.

The convention of 1846 was the first constitutional convention ever assembled in this state which really deserved to be styled a people's convention. The deputies or delegates in the convention of 1777 represented mainly the proprietors of great estates and their tenants. The delegates to the convention of 1821 were chosen by owners of real or personal property. The delegates to the convention of 1846 were elected upon the basis of almost universal suffrage. The truly popular origin of the convention may serve to explain its apotheosis of the notion that all power emanates from the people. The cardinal distinction between this convention and all its predecessors is that its work seems chiefly to be a revesting in the people of the state of delegated power. It is remarkable less in regard to the power which it bestows, than that which it resumes. The constitution of 1777, like all the early state constitutions, gave the legislature undue predominance. The constitution of 1822 took away from the legislature a large share of the appointing power, and vested it partially in the governor and partially in the senate and assembly. It also gave the governor the right to veto bills passed by the two houses of the legislature. But each of these constitutions left the area of legislation unrestricted. The chief innovation of the constitution of 1846 was in limiting the sphere of legislative action. It accomplished this result in two modes: in the first place, it deprived the legislature of power to incur debts or to undertake costly schemes of public improvement, without direct popular consent, and forbade it loaning the credit of the state to private capital.

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In the second place, it removed all fetters from industry and commerce by prohibiting the granting of special franchises or privileges, and by requiring that all corporations other than municipal should be created under general laws. The restraints which the constitution of 1846 placed upon the legislative branch of the state government are the most valuable service performed by the convention. Articles VII and VIII of the constitution of 1846 embody these provisions. These articles form a new bill of rights, no less important than any which the third estate ever wrested from monarch or nobility. They assert the supremacy of the people over the legislature, of the principal over the agent, and add a needed bulwark against the tyranny of a temporary majority, — one of the greatest dangers incident to a republican government. We are prone to think that the constitution of 1846 is chiefly memorable because it made judicial and state offices elective; but by far its greatest contribution to the political development of the commonwealth is to be found in the limitations with which it surrounded the legislative department. These provisions have not checked the commercial or industrial progress of the state nor rendered its supremacy uncertain, but they have saved it from such gigantic indebtedness as has hitherto weighed upon the nation and still burdens our counties, cities and towns.

The convention reported a new constitution which embodied the greater part of the old. The radical changes related to:

1. The canals; internal improvements; public revenue and public debts.
2. Incorporations.
3. The election of state, judicial and local officers.
4. The enlargement of the number of senate districts, and the substitution of district for county representation in the assembly.
5. The re-organization of the judiciary and reformation in the system of legal precedure.
6. The methods of amending the constitution.

First: The subject of public improvements and public debts, which was the chief cause for the summoning of the convention,

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is treated in article VII of the constitution of 1846. As originally ratified, the article first provided for keeping the canals of the state in repair. It then applied $1,300,000 of the surplus revenues from the canals every year until 1855, to the liquidation of the principal and interest of the canal debt, and thereafter devoted $1,700,000 annually to the same purposes. It set apart annually $350,000, and, after the extinguishment of the canal debt, $1,500,000, to the redemption of the principal and interest of that part of the state debt called the general fund debt, which it was claimed in the convention had been incurred for the canals and which therefore the canal revenues ought, equitably, to defray. As in the legislatures of 1842 and 1844, so in the convention, were to be found earnest advocates for and against the enlargement and completion of the canals. With some, the extinguishment of the debts in the shortest period, at least within the period contemplated by the law of 1842, was the paramount idea. Others were animated by the desire to see the works completed and enlarged so as to produce the fullest benefit to the state and to prevent the diversion of western trade to other Atlantic ports, even at the cost of delaying the liquidation of the debt, and it was the purpose of this class to secure provision out of the canal revenues for the requisite completion and enlargement. The constitution made provision for the necessary work, and so fortunate was the state, that she was able to pay the debts then charged upon the canal revenues, in as short a time as was anticipated by those most desirous of seeing them promptly extinguished.

Article VII also directed that the legislature should never sell, lease or dispose of the canals or the salt springs belonging to the state.

But the most important provisions of the article were contained in sections 8 to 14 inclusive, and they have remained intact to the present day. Section 8 forbids the payment of money or funds of the state except in pursuance of appropriations by law; section 9 declares that the credit of the state shall not in any manner be given or loaned to or in aid of an individual, association, or corporation, thus preventing subsidies

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to railroads or to other public enterprises originated by private capital; section 10 empowers the legislature to contract debts in order to meet casual deficits or failures in revenue or expenses not provided for, but such debts, direct and contingent, singly or in the aggregate, shall not at any time exceed one million dollars. Moneys raised to pay such debts must be rigidly applied to the specific purposes for which they have been obtained. Section 11 declares that these limitations shall not apply in extraordinary emergencies. The state is therefore left free to contract debts in any amount, in order to repel invasion, suppress insurrection, or defend itself in war; but moneys raised for any of these objects must be sacredly devoted solely to their accomplishment. Section 12 ordains that, with the exception of the debts specified in the tenth and eleventh sections, the state shall contract no debt except in pursuance of a law specifying the sole work and object for which the debt is incurred; that the law must also provide for the collection of a direct annual tax, sufficient to pay the interest on the debt as it falls due and the principal within a period of eighteen years from the time when the debt shall have been contracted; and that every such law, before it can take effect, must be submitted to the people and be sustained by a majority of all the votes cast for and against it. Even after popular sanction has been thus obtained, the legislature may repeal the law or stop the work. To prevent the enactment of such laws in moments of public excitement, the section provides that no such measure shall be voted upon by the people until three months shall have elapsed since its passage through the legislature. Nor can a vote be taken upon any such law when any other enactment or bill, or any amendment to the constitution is to be voted upon. Section 13 provides that every law which imposes, continues or revives a tax, shall distinctly state the tax and the object to which it is to be applied, without reference to any other law, in order to fix the tax or object. Section 14 requires that the vote in either house upon all such measures shall be taken by ayes and noes, which shall be entered on the journals, and that three-fifths of all the members elected to either house shall be

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necessary to constitute a quorum whenever such measures are to be voted upon.

Second: Article VIII of the constitution of 1846 contains the second class of restraints on the state legislature, namely, those which relate to the creation of corporations.

The state had long suffered from the evils of special legislation. The constitution of 1822 supplied a partial remedy by requiring the assent of two-thirds of the members elected, to every bill appropriating public money or property, for local or private purposes, or creating, continuing, altering or renewing any body politic or corporation. Mr. Wheaton, one of the delegates to the convention of 1821, offered a resolution in that body making it imperative on the legislature to enact general laws on the subject of private corporations, but his resolution was not adopted.

Article VIII of the present constitution represents the work of three separate committees of the convention of 1846, — the committee on municipal corporations, the committee on banking corporations, and the committee on incorporations other than banking and municipal. The reports of the several committees, so far as adopted by the convention, are contained in the article. The article forbids special charters for private incorporations, and renders the shareholders in a corporate enterprise responsible for corporate debts. As was well said in the convention:

> The people had seen a system existing by which the government had granted to particular individuals special privileges which had been refused to others, contrary to the great principle of equality among men. They had seen not only that, but that, when these special privileges, which were essential to the very nature of a corporation were exercised, they had the further privilege of immunity from loss arising from business, which other individuals had not from loss by their business.

Special prohibition of the granting of special charters for banking purposes is also inserted in the article; the legislature is forbidden to sanction in any manner the suspension of specie payments by any person or association issuing bank notes; and is required to provide for the registry of all bills issued to circulate as money and for their redemption in specie. Stockholders

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in banks of circulation are made individually responsible for corporate debts to the extent of their shares, and bill holders are, in the event of the insolvency of a bank, given a preference over all its other creditors. As the Dartmouth College decision had placed all corporate charters theretofore granted above revocation, the constitution wisely reserved to the legislature the power of altering or repealing such charters as should be thereafter granted.

Third: Next in importance to the restrictions upon the law-making power imposed by the constitution of 1846 is the change which it made in the system of appointment. The first constitution vested the power of appointment, in all its amplitude, in the council of appointment; the second constitution clothed the governor and the senate with this function except in the case of state officers, who were to be elected by the two houses of the legislature. The policy of 1846 was decentralization. It gave to the people in their several localities the right to elect, not only the officers hitherto appointed by the governor, and the state officials previously elected by the senate and assembly, but also district attorneys, clerks of counties and, practically, all county, city, town and village officers. The power of removal, which the constitution of 1822 had divided between the governor and the legislature, was retained in the same hands, but the extent of the power was greatly increased. While the tendency in electing was decentralizing, the power of removal was centralized. The people elect, but either the governor and senate, or the legislature may remove for misconduct in office.

Fourth: The decentralizing spirit of the convention also wrought a change in the tenure of the senatorial office and in the mode of electing senators and assemblymen. The state was divided into thirty-two senatorial districts, and each district was to choose a senator every two years. County representation in the assembly was abolished and district representation substituted. The new constitution directed that members of assembly should be apportioned among the several counties of the state as nearly as might be according to the number

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of their respective inhabitants, excluding aliens and persons of color not taxed, and should be chosen by single districts. But every county except Hamilton was insured at least one member. Provision was also made for a new census and a new re-apportionment every ten years. The defects of our present method of assembly representation have been recently discussed in the New York city press, and will be considered in a later article, in conjunction with the efforts of the convention of 1867 to return to the system adopted by the convention of 1821.

Fifth: The new constitution retained the court of impeachment, but abolished the court for the correction of errors. Chancery courts as separate organizations also ceased to exist, and the old expensive and tedious methods of taking testimony in equity cases were abolished. It would be a great advantage to suitors in the Federal tribunals if the same reform were introduced there. Under the present practice in the United States courts testimony in equity cases is taken before a master, and, as he has no power to pass upon evidence, all evidence presented by either party however irrelevant or immaterial must be accepted and printed for the use of the court.

The constitution of 1822 had abolished the former supreme court, thus "constitutionizing" the judges of that court out of office, among them such jurists as Van Ness and Spencer. The constitution of 1846 also created a new supreme court, investing it with general jurisdiction in law and in equity. It divided the state into eight judicial districts, of which New York city was to be one, the others to be bounded by county lines and to be compact and as nearly equal in population as possible, and allotted four supreme court justices to each district, excepting the district which was co-terminous with the city and county of New York, which was to elect as many such justices as the legislature might prescribe. The term of office was fixed at eight years. It established a court of appeals of eight judges, four of whom were to be elected by the electors of the state for eight years, the remaining four to be selected by methods to be provided by law, from the justices of the su-

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preme court having the shortest time to serve. The judges of the court of appeals were to be so classified that one should go out of office every year; the judges of the supreme court were to be so classified that one judge in each district should go out of office at the end of every two years. Provision was also made for supplying vacancies in the membership of these tribunals.

The constitution also authorized the establishment of tribunals of conciliation, to hear cases voluntarily submitted by parties and to render judgment thereon. It required the first legislature convened after its adoption to appoint commissioners to revise the system of practice in the courts, which resulted in the simplified system of procedure subsequently adopted in this state and substantially copied in most of our sister states and even in England. It required the adoption of similar measures to secure the codification of the substantive law of the state, but, although the commissioners charged by the legislature with this duty, reported a code of the law many years ago, so great has been the hostility it has encountered from the bar that it has never been enacted nor has any code been substituted in its place.

Sixth: While the constitution of 1822 made provision for its amendment by legislative resolutions approved by the people, it did not provide for amendment by the process of a constitutional convention. The act of 1845, disregarding the express language of the constitution, provided for the election of delegates and the holding of a convention. Two views have been entertained as to this enactment; one is that although extra-constitutional, it was justifiable as a peaceful revolution. The other upholds its constitutionality, on the ground that the right of amendment by convention is a popular right underlying the constitution of every free people, which cannot be withdrawn from the people, notwithstanding the constitution may furnish other methods for amendment. This interesting discussion is set at rest in this state by article XIII of the constitution of 1846, which provides for ascertaining the popular desire for a convention, at least once in every twenty years, and for the

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holding of a convention at shorter intervals whenever the people so will. Thus the constitution of 1846 secures two methods of amendment, the one by legislative initiation, sustained by popular vote, the other by a convention. This double method is now found in the constitution of many of the states. The history of the state demonstrates the practical value of this dual plan.

The fourteen articles which made up the constitution of 1846 were submitted for popular approval as a whole. The address of the delegates in convention to the people of the state well sums up their work:

> In these fourteen articles, they have reorganized the legislature; established more limited districts for the election of the members of that body and wholly separated it from the exercise of judicial power. The most important state officers have been made elective by the people of the State; and most of the officers of cities, towns and counties, are made elective by the voters of the locality they serve. They have abolished a host of useless offices. They have sought at once to reduce and decentralize the patronage of the executive government. They have rendered inviolate the funds devoted to education. After repeated failures in the legislature, they have provided a judicial system, adequate to the wants of a free people rapidly increasing in arts, culture, commerce and population. They have made provision for the payment of the whole state debt and the completion of the public works begun. While that debt is in progress of payment, they have provided a large contribution from the canal revenues towards the current revenues of the state and sufficient for that purpose when the state debt shall have been paid; and have placed strong safeguards against the recurrence of debt and improvident expenditures of the public money. They have agreed on important provisions in relation to the mode of creating incorporations and the liability of their members and have sought to render the business of banking more safe and responsible. They have incorporated many useful provisions more effectually to secure the people in their rights of person and property against the abuses of delegated power. They have modified the power of the legislature with the direct consent of the people, to amend the constitution from time to time and have secured to the people of the state, the right once in twenty years to pass directly on the question whether they will call a Convention for the revision of the Constitution.

J. HAMPDEN DOUGHERTY.

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REVIEWS.

Governor Chamberlain's Administration in South Carolina. A Chapter of Reconstruction in the Southern States. By WALTER ALLEN. G. P. Putnam's Sons, New York and London, 1888. — viii, 544 pp.

In spite of Emerson's warning against the superlative we venture the opinion that no existing or historical state can furnish a decade of politics in which many of the essential theories of democracy can be so profitably studied as in the history of South Carolina from 1867 to 1877. For nearly a century Americans of the Northern states had pretty generally accepted the theory, that somehow every free man had as much a right to vote as he did to have equality before the law. It was largely due to this fact that, when the ruling North saw that the South intended to deny the negro the right of suffrage, she passed the Reconstruction acts of March, 1867, and forced them upon her. *Governor Chamberlain's Administration* treats little more than the last fifth of the decade mentioned; and its character will be better understood if we recall some of the leading facts of the preceding years.

In 1867 the number and ignorance of the negroes were so great that the colored voters who could neither read nor write formed more than a majority of the entire voting population of South Carolina. The registration of the voters was undertaken by the Federal government. The Democrats very largely declined to take any part in politics. The negroes, on the other hand, came forward with great enthusiasm. They were led by Northerners, many of whom had been officers in the army or were managers of the Freedmen's Bureau. The convention which met at Charleston in January, 1868, for the purpose of forming a state constitution was composed of nearly twice as many negroes as whites. Although this convention provided for the levy of a tax to the amount of nearly two and a quarter million dollars, only thirteen of the sixty-three colored members paid any taxes. The same year the first reconstruction governor and legislature were chosen. The governor, R. K. Scott, had recently come from the North and had been an officer of the Freedmen's Bureau. In the legislature the negroes alone had a large majority on a joint vote, and the Republicans outnumbered the Democrats nearly six to one. There was nothing to hinder the Republicans from constructing a partisan paradise.

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The first great undenied fraud was the scheme by which seven hundred thousand dollars was sunk in the purchase of almost worthless land, with the avowed purpose of furnishing good land to the poor at a moderate price. Even the ignorant and unscrupulous legislature had a few moments of righteous indignation, and a committee of investigation reported that the whole scheme had been made to subserve "the primary benefit of the members of the advisory board and the land commission and their subservient allies." No one was prosecuted on account of this fraud.

One would expect that so illiterate an assembly would have very small expenses for printing. Yet the cost for printing and advertising during the years 1868 to 1874 amounted to $1,104,569.91. This was nearly twice as much as the state had paid during the whole period from 1790 to 1868. "And what has the state to show for it? Absolutely nothing," said Governor Chamberlain in 1876. The most facile scheme of plunder was the issue of fraudulent pay-certificates on the treasury by the speaker of the assembly and the president of the senate. Certificates of this character amounting to nearly a million dollars, were issued during a single session of the legislature. Considering the poverty of the state, large salaries were paid to officers and servants of the government. Offices were multiplied in order to make places for negroes who had a strong desire for practical politics. Fraudulent state bonds were issued to the amount of more than six million dollars. Members drank and smoked and indulged in all sorts of luxuries at the expense of the state. After Scott's second term, F. J. Moses, Jr. was governor, from 1872 to 1874, and corruption and greed became more prevalent with each year. From the governor down, there was either corruption or conniving at corruption among a majority of the legislature. There was nowhere to be found among the thieves either shame or fear of prosecution. Now and then personal spite or insatiable greed led one to blurt out the truth about another. On one such occasion the accusation was coolly answered by suggesting that the state ought to enlarge its penitentiary; for the present accommodations would be found to be too small if the legislature should undertake to prosecute its members who had taken part in the plundering. The state debt at the beginning of negro rule amounted to about five and a half million dollars; at the end of Moses' administration it was more than twenty millions. Let this suffice as a sample of the corruption prevalent. What else could be expected of a state that tolerated as many as two hundred justices of the peace who could neither read nor write?

When Daniel H. Chamberlain was nominated in 1874, as the candidate of the worst element of the Republican party, there was an extensive bolt, and a reform candidate was placed in opposition. The Democrats

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voted with the latter faction. The division in the Republican party caused a closely contested campaign in which each side made solemn promises of honesty and reform. Chamberlain was elected. To the great surprise of his opponents and to the consternation of many of his friends, Governor Chamberlain's inaugural address and message to the legislature were fully up to the promises of the campaign. They gave the minutest details as to the political condition of the state, denounced extravagance here and incapacity there and described the manner in which they should be remedied. The entire tone of each document is that of a sincere reformer and is well represented by a sentence from his first message:

> My political principles will never be concealed or compromised, but whenever the necessities of any political party shall require me to disregard or abuse my public trust, then my allegiance to that party shall cease.

In less than six months his party began to denounce him as a "traitor," whereas the Democrats were praising him for his painstaking efforts for reform. The legislature persisted in trying to follow its own inclinations, but its measures met with reproachful and effective vetoes from the governor. He forced it to cut down its expenses. In one of the counties there was a great deal of disorder and some bloodshed, largely due to a negro militia. With unprecedented fairness the governor promptly disarmed them. The members of commissions and cliques by which the treasury had been robbed now found that there was a serious obstacle in their path. They tried to win the governor's favor by making the usual appeals to party spirit. He seemed suddenly to have grown cold and to have become impervious to every appeal save that for the best interests of the state; he did his own thinking and followed his own plans.

The legislature continued in its mockery of just legislation; the treasury was empty; no new fraudulent schemes could get past the governor. It only remained for the legislature to devote its time to further destroying the state credit and to advance the worst Republicans to the highest offices. Several times the state was unable to obtain on its own credit fuel for heating its halls. The election of Moses and Whipper as circuit court judges is a conspicuous example of the corruption of the legislature. Moses was the ex-governor and had long been most notorious as utterly venal. Since the days of reconstruction he has spent most of his time in the penitentiaries of two or three Northern states. Whipper was then, as now, a hard-drinking gambler, ignorant of the law. Chamberlain's wrath at such a selection knew no bounds. He denounced the men in merited terms and succeeded in outwitting the legislature by withholding their commissions. It in turn threatened him with impeachment.

This won him the favor of nearly the entire white population of the

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state. The Democrats praised and feasted him as if he were the most carefully chosen native "idol." He received countless invitations to address the best intelligence of the state on literary and political questions. Many of these invitations were accepted. In all of his utterances at this time we find that the governor rose to the dignity of the occasion and showed himself a man both of superior mind and of worthy ambition (*vide* pp. 117, 153, 155–6). In two years Governor Chamberlain cut down the expenses of South Carolina so as to save the state more than a million and a half dollars.

There are many reasons to believe that during 1875 and the early part of 1876 Chamberlain thought that it would be possible for him to unite and obtain the support of the best elements of each party. There seems to be no reason to doubt that if it had not been for the baneful influence of national politics in South Carolina, the union would have been effected. Each of the two national parties felt that the vote of South Carolina might be essential to victory. The leaders in Washington wished to hear nothing about compromise and reform where it might be at the expense of their party; they knew that reform was not the object of parties. Oliver P. Morton called Chamberlain to account for his intimacy with the Democrats. Chamberlain's Republican support was weakening much more rapidly than that of the Democrats was growing, and he seemed to think it necessary to restate his position. To President Grant he wrote:

> I have been a strict party man, adhering to my party here in South Carolina through good report and through evil report, never for once questioning its rights amid the greatest discouragement arising from the bad conduct and suicidal policy of many of its most prominent members (p. 228).

To Morton he replied in similar tenor. This naturally caused many of the Democrats to question Chamberlain's sincerity for reform. The murder of several negroes in cold blood by Democrats at Hamburg and subsequent events relating thereto, tended to greatly heighten party feeling in the state; and Chamberlain's denunciation of these murders created much personal hatred against him.

In spite of the zealous endeavor of the Charleston *News and Courier* and many of the best Democrats of South Carolina to have no opposition made to Chamberlain's re-election, a "straight out" Democratic ticket was nominated. All chance of Democratic support being gone, the governor warmed toward the Republican politicians, and after a hard struggle he was secured a re-nomination. In order to gain the full support of his party he gave up denouncing the thieves, and went into an arm-in-arm campaign with one of the worst of them, R. B. Elliott, the colored candidate for the office of attorney-general. The character

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of this political period is so well remembered as to render particulars needless. For years the only thing that had rendered the negro government possible was the knowledge on the part of the whites that it was upheld by the Federal army. When President Hayes announced his plan of withdrawing military support, Chamberlain was so thoroughly convinced that a majority made up of the poorest and most ignorant voters was not strong enough to govern, that he at once resolved to give up the struggle against the Democrats and leave the state. This was the death of the Republican party in South Carolina.

Although *Governor Chamberlain's Administration* contains many documents which will be of lasting historical interest, the book as a whole must be put down as highly disappointing. The author — a mere eulogistic editor, in fact — gives us a heavy octavo volume of five hundred and fifty pages, fully four-fifths of which are printed in small type; yet for some mysterious reason nothing is given that could properly be called even a sketch of the period from 1868 to 1874. During the first four years of the period, be it remembered, Chamberlain was attorney-general of the state, and in very questionable relationship with those who were robbing the treasury; whereas it was his duty to attempt to prosecute these thieves, or, failing in that, to abandon such company. If Governor Chamberlain is to occupy in history the high position his eulogist desires, his record as attorney-general will need to be cleared up; for the plea of ignorance (the only one given) of facts that at the time were notorious, will not answer for one who was among the cleverest lawyers of South Carolina. We are not of those who believe that either Attorney-General or Governor Chamberlain shared in the raid upon the treasury; but the evidence indicates that at times he so far yielded to the influences of party as to lay aside the code of strict honesty, in order to retain the favor of the thieves and ignoramuses about him. He himself has admitted (p. 505) "a grave mistake" in being a candidate on the same ticket with Elliott, and has said in addition that he might have forced Elliott's withdrawal.

There are two further facts which must condemn the book in the estimation of sincere students of the history of reconstruction in South Carolina. While the author, both in his own words and by quotation from various sources, is constantly striving to establish Governor Chamberlain's position as a reformer, the reader will search the volume in vain for more than a few statements of specific acts of corruption of the previous administrations. The sums total are given in certain cases. But *how* were these millions stolen? and *who* were the thieves? Of this we should be very ignorant, if there were no other sources of information than this book. But the most serious criticism is that the book is very partisan. With but one or two exceptions, the author has given no

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hearing whatever to those who argued with or criticised the governor. He can only spare room to state briefly the gist of the unfavorable criticism; but he finds abundant space for the voluminous letters and arguments of the governor, in frequent repetition, and for innumerable newspaper clippings, many of which are of little or no value. A reprint, as is the case with this book, of one-half of the documents in a bitter political struggle, cannot properly be called even "a chapter of reconstruction in the Southern states."

FREDERIC BANCROFT.

American Commonwealths: Missouri. By LUCIEN CARR. Boston. Houghton, Mifflin & Co., 1888. — 12mo, 397 pp.

The bright hopes entertained by students of political science upon the announcement of the *American Commonwealths* series have not been realized in the case of *Missouri*. It contains many interesting facts; but it is unsystematic, carelessly written, and deeply tinged with the peculiar political theories of its author. The reader has a right to expect that this book should busy itself with the history of the commonwealth of Missouri, and that, in view of the limited space, only such facts concerning the early history of America, of Louisiana Territory, and of Missouri Territory should be adduced as shed a direct light upon the social, economic, or political history of the commonwealth. But of 371 pages, 138 are devoted to the ante-commonwealth stage, of which much is padding. Of the remainder of the book, 24 pages contain an account of the struggle over the admission of Missouri, the Mexican war takes up 31, the Civil war 96, and the years from 1865 to 1888 only 8 pages. The author says nothing about the constitutional law of the commonwealth; he does not even mention the three constitutions, with their respective modifications.

The most annoying feature of the book is the evident haste and carelessness with which it is written. Examples of this are the reference to the Family Compact of "1762" (p. 65); an error in defining the boundary of the United States as fixed by the treaty of Versailles in 1783 (p. 70); the persistent misuse of technical terms, such as a reference to the "French Code" under the year 1769 (p. 37), to Missouri as a "State outside of the Union," during the period that elapsed between the adoption of a constitution and the admission to the Union (p. 151), to "states-rights, or as it is now termed, local self-government" (p. 285), the persistent denomination of the Democrats that opposed the admission of Missouri with slavery as "Federalists" (pp. 161, 162, 172, 173); and the remarkable statement that the determination of the people of the Ohio valley to enjoy the free navigation of the Mississippi in 1790, ultimately led to secession and civil war (p. 73).

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Mr. Carr has forgotten a great many things, but he has learnt nothing of the interpretation put on the constitution of the United States by the late war. He clings to the doctrine of Cass and Douglass, once so popular in the Southwest. He regards slavery as a domestic institution, beyond the jurisdiction of the United States, even in the territories; the attempt to impose any condition upon a commonwealth at the time of its admission is unconstitutional (p. 144), and an infringement upon the equality of the commonwealths (p. 158); the Missouri Compromise was "a transaction in which the North gained everything and conceded nothing" (p. 146); the Mexican war was occasioned by Mexico (p. 199), which received "a very handsome monetary consideration" for the cession of 1848 (p. 219); and the Kansas-Nebraska bill was "a tardy act of justice to the South." It is a curious fact that the Dred Scott decision, although the source of many of the arguments of the author, and often referred to in support of them (*e.g.* on pp. 144, 146, 147, 158, 159, 225, 242), is never quoted by name in this book. The struggle in Missouri in 1861 was precipitated by General Lyon, F. P. Blair and the loyalists, according to Mr. Carr. The index is very deficient, omitting many names and events mentioned in the text.

ROBERT WEIL.

History of Agriculture and Prices in England. By JAMES E. THOROLD ROGERS. Vols. V and VI (1583–1702). Oxford, Clarendon Press, 1887. — 849, 768 pp.

The present instalment of this noble work covers the period between the rise of prices in Elizabeth's reign and the beginning of the reign of Anne. The plan followed is the same as that of the earlier volumes. The basis of the work is the statistical tables which fill alternate volumes, and which contain statements by years of the prices of grain, meat, and other agricultural products, fish, fuel, the metals, building materials, textile fabrics, imported commodities of all kinds, and labor. These are also arranged by years and decades. The sources whence the prices are derived are the accounts of various colleges at Oxford and Cambridge, those of Eton and Winchester, and a number of individuals and families. The material is entirely new. Based upon it are the deductions contained in the text of the companion volumes. But the work, when complete to 1793, will be more than a history of prices. It will be a social history of England, for it traces not only the development of agriculture, but that of foreign and domestic trade, of manufactures, of the currency, of taxation, the progress of the artisan and the agricultural laboring classes, and the distribution of wealth. It is a monument of labor and learning such as few men in any age have been

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able to erect. When one compares it with works of a similar character published in Germany, he notices at once that it surpasses them all in wealth of purely economic material, though it is inferior to them in its treatment of the legal development which modified the production and distribution of wealth. Enough, however, is given to show that the influence of government was sufficiently strong, and, in the opinion of the author, to a large extent injurious.

Some of the results of his study of the period before us have already been published by Professor Rogers in his *Six Centuries of Work and Wages*, and in his *First Nine Years of the Bank of England*, but the material contained in the present volumes is so ample as to make substantially a new work. Their contents, so far as they are of permanent historical importance, may be briefly summed up as follows:

Between 1583 and 1642 the price of wheat, as compared with the average of the previous forty years, increased 209 per cent, and the prices of all kinds of grain used for food increased on the average 166 per cent. Animal food became dearer during the same period by 184 per cent; fuel by 89 per cent. The wages of labor rose, however, only 106 per cent. Or, if the average be changed so as to show the actual relative increase of the prices of provisions and of labor during the period in question, it appears that they rose in the proportion of three to one. During these years also occurred a series of unusually severe droughts. The causes assigned for this rapid rise of prices are the importation of the precious metals through increased foreign trade, and the steady growth of population unaccompanied by any improvement in the methods of agriculture. During this time those who depended wholly upon their labor for support were at a disadvantage, because wages rose so much less rapidly than the cost of living. They needed every possible aid to save them from ruin. But instead, the act of the 5 Elizabeth, cap. 4, was passed, which gave the justices of quarter sessions power to fix the rates of wages annually for husbandmen and artisans, and to compel all of the latter class to serve an apprenticeship. According to the terms of the act, regard was to be had to the condition and needs of the laborer, but these were little heeded. The justices belonged to the landlord and employing class. At last, they had an opportunity to screw the laborer down to a mere pittance, to rob him of the advantage he had possessed since the fourteenth century. They availed themselves of the chance to the full. The copies of justices' assessments which Professor Rogers has collected show that the rates they established were lower than those actually paid. They were so low that they could not be enforced. As it was, however, the wages of the unskilled laborer sank to such a degree that they would not procure for him the necessaries of life, and advances had to be made out of the poor

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rates. In this way the English peasant, who during the middle age had lived in the enjoyment of "rude abundance," sank into a condition of distress approaching pauperism. Population continued to breed, much as that of Ireland does at the present time. The act concerning parochial settlement, passed after the Restoration, bound the laborer to the locality where he was born, and so deprived him of the benefit of competition for his services.

By the middle of the century the sufferings of the peasantry were at their height. The masses of the English people received no benefit from the triumph either of parliament or the king. Their interests were disregarded by both alike. After 1660 wages slowly rose till near the close of the century, and then remained stationary until the time of Arthur Young's tours. But the rise Professor Rogers attributes to repeated visitations of the plague, and to the fact that the justices by their assessments had reduced wages too low for their own interest and had to remove the pressure a little. In explaining variations of price in general he assigns but little weight to fluctuations of the currency, as compared with movements of the population and the influence of law.

Meantime the conditions were very unfavorable for the tenant farmer. Rents increased rapidly, owing to the economic conditions already mentioned. Besides this the carrying out of improvements by the tenant was almost invariably made an excuse for a further raising of rents. Also, Professor Rogers believes that the Statute of Frauds, passed in 1677, operated to reduce to tenancies at will many freeholds which had been created and conveyed by ancient legal forms, but did not rest upon documentary evidence. It is mainly in this way that he explains the rapid disappearance of freeholders between the Restoration and the Revolution. Hence the origin of the agricultural system of modern England, with its three classes of landlord, tenant, and laborer, is explained largely by the rise of prices in the first half of the seventeenth century, the effects of which were intensified and made destructive for both tenant and laborer by the selfish policy of the landlords. Not only are Professor Roger's investigations valuable for the student of history, but they must have an important practical bearing upon the land question in England to-day. As an historian the author is bound to condemn an institution thus established and maintained. It is without historic justification. As an English liberal he naturally insists that the land system of that country should be dealt with according to its merits, irrespective of any claims which may arise on the ground of its antiquity.

H. L. OSGOOD.

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History of Co-operation in the United States. Johns Hopkins University Studies in Historical and Political Science. Herbert B. Adams, Editor. Vol. VI. Baltimore, N. Murray, 1888. — 8vo, 540 pp.

The five writers whose studies are brought together in this attractive volume have garnered from new fields and present to their readers a harvest of first-hand observations that are full of fresh interest. As a contribution to descriptive political economy their work merits notice for the promise it gives of results to be won through the application of historical and inductive methods to the richly varied phenomena of American economic life. To the literature of co-operation, we need hardly say, it is an invaluable addition. It is the first, and for a good while to come it will be the only fairly complete account of the rise and growth of co-operation in this country to the present time, preserving records of industrial experiments that, but for this opportune publication, must soon have disappeared beyond recovery. The plan of preparing so comprehensive a history of the co-operative movement in the United States originated with Professor Ely, who writes an introduction, and all the collaborators are Johns Hopkins University men. New England and the Middle states were assigned to Dr. Edward W. Bemis; the Northwest and the Interior states to Dr. Albert Shaw, of the Minneapolis *Tribune*, and Dr. Amos G. Warner; the Pacific coast to Charles Howard Shinn, editor of the *Overland Monthly*, and the South to Dr. Daniel R. Randall. Dr. Bemis and Dr. Shaw found more abundant materials than the others, and their chapters are the most important part of the book, but every section of the country has afforded novel and instructive facts, and all the writers have done their work carefully and well. Thus Dr. Randall gives us a clear though brief account of the important relief associations of the Baltimore & Ohio and the Pennsylvania railroads, and passes a favorable judgment on that primitive form of co-operation, prevalent in the South, known as farming on shares. Dr. Warner describes Zion's Co-operative Mercantile Institution and other forms of co-operation among the Mormons, and, more important in its practical bearings, presents a critical account of the unsuccessful co-operative efforts of the farmers of the granger states. Mr. Shinn's chapter includes accounts of the Italian and Swiss agricultural colony, the co-operative commonwealth of Kaweah, and interesting forms of co-operation among the Chinese. Dr. Shaw, besides his brilliant account of the co-operative coopers of Minneapolis, contributes a sketch of the Amana agricultural colony and other co-operative undertakings of the Northwest that he has discovered. Dr. Bemis alone has had occasion to deal with the history of American co-operation from the

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beginning and in all its phases. He goes back to the Brook Farm experiment and recounts the rise and fall of the Protective Union and of the Sovereigns of Industry. He gives a detailed, and, as far as possible, a statistical account of distributive and productive co-operation and of co-operative banking in New England and the Middle states, and a circumstantial account of the experiments in profit-sharing.

In the aggregate the magnitude of American co-operative undertakings is not small, and among them are some so remarkable that we must hope, with Dr. Ely, that the well-worn text-book examples of co-operation, drawn from European sources, may make way in the newspapers and periodicals for these fresher experiments. But a large proportion of them are sporadic, having little or no organic connection with one another, and, with a few noteworthy exceptions they have been, so far, rather crude in conception and conduct. But few of them have had the benefit of exact knowledge of similar experiments elsewhere. Distributive co-operation in England has attained to its remarkable perfection largely because new co-operative societies have each had, from the start, the aid and counsel of men already thoroughly trained. This, American societies have rarely enjoyed, but, as might be expected, we find that it is where there has been something nearly approaching it that co-operation has had its best growth. Dr. Bemis brings out the significant fact that men who were members of the Brook Farm community bore a prominent part in subsequent co-operative undertakings in New England. Looked at from this point of view, the importance of the American co-operative undertakings now in existence is not measured by the magnitude of the business they are doing, nor by their success in earning profits for their members. In every state they are educating large numbers of men in co-operative habits, and so preparing one of the necessary conditions for a more perfect co-operation in the future.

The great variety of co-operative plans that have been tried, and their mutability, is one of the most striking facts. It would seem that every form of organization and business method had been attempted, and that, through a severe process of natural selection the Rochdale plan, or something very like it, had everywhere proven its fitness to survive. The success of the Arlington association at Lawrence, Mass., shows that this form, consistently carried out and lived up to, is as well adapted to the industrial population of American towns as to that of England. The general conclusion is warranted from the data drawn from the wide area covered by these five investigators, that workingmen contemplating distributive co-operation ought to familiarize themselves thoroughly with the English system, secure one or more members, if possible, who have been trained under that system, and then adhere to it closely.

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In co-operative banking, on the other hand, European co-operators can learn of us. Nowhere in the world has this form of economic association attained to such perfection as in Pennsylvania and in Massachusetts, nor to such legal standing as in the latter state, where wise legislation and state supervision have sifted out and made mandatory the best rules and methods. In some ways, as Dr. Bemis points out, they might still be improved, and there is every reason to believe that they will be.

Productive co-operation, too, has made some remarkable records in this country. No attempt has ever carried out more completely the co-operative ideal of making workingmen self-employers and receivers of profits in proportion to their respective efforts than has that of the coopers of Minneapolis. It is worth while to note in passing that their form of distribution makes capital the servant and labor the master, share capital drawing interest only. Dr. Shaw's account of the patient endeavors and well-earned success of these men is fascinating and inspiring. Still, it will not do to forget that, humble and poor as they were, they enjoyed some rather exceptional advantages, chief of which was a very remarkable local market which they were able to live on such terms with as to have it practically to themselves. So far as the mere production of goods in the shop or factory with the greatest economy is concerned, productive co-operation has some points in its favor. It is in the market that ordinarily it is left behind. Possibly through the evolution that trusts are bringing about, co-operative associations will find the conditions for which they have been waiting. If the *entrepreneur* function is to be permanently divided into the two distinct functions of superintendence and marketing — if the factory is to do nothing but turn goods over to a selling agency and share *pro rata* in the proceeds, co-operative producers ought to be able to hold their own in such combinations. Be this as it may, it is convincingly shown in the history before us that productive co-operation is not of universal application. All these writers, like other students of the subject before them, insist that co-operation requires picked men. For lack of enough of these we see co-operative associations, one after another, developing into ordinary corporations, a few men securing entire control. Not only so, but only men of a certain middle rank in the wages class have any disposition to co-operate. Until they are ready to settle down contentedly in one place they are not proper material for co-operation or industrial partnerships founded on profit-sharing. So long as they are journeymen, in the literal sense of the word, the trade union, with its travelling cards and benefit features, is the better organization for them. And when they have acquired some property, individuality again asserts itself, as it does amusingly in the agricultural colonies of California, described by Mr. Shinn, which begin

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as co-operative associations, cultivate the land in common for ten years or so, and then divide it into severalty holdings.

F. H. GIDDINGS.

Lehrbuch der Finanzwissenschaft. Von Dr. KARL UMPFENBACH, o. ö. Professor der Staatswissenschaften an der Universität Königsberg. Zweite Auflage. Stuttgart, Ferdinand Enke, 1887.—8vo, xii, 517 pp.

Die Steuer. Erster Band. Die Steuer und das öffentliche Interesse. Eine Untersuchung über das Wesen der Steuer und die Gliederung der Staats -und Gemeinde-Einnahmen. Von Fr. J. NEUMANN. Leipzig, Duncker und Humblot, 1887.—Small 8vo, ix, 562 pp.

Saggio sul Sistema Tributario in Italia e sui suoi Effetti Economici e Sociali. Esposta da GIULIO ALESSIO, Professore incaricato di scienza delle finanze e di economia politica nella Universita di Padova. Le Basi economiche del sistema tributario, Vol. I. Le Imposte Dirette, 1883. Vol. II. Le Imposte Indirette e le Tasse. Torino, Fratelli Bocca 1887.—Large 8vo, viii, 390; vii, 1005 pp.

There are two methods of writing works in the science of finance. The one is essentially historical and descriptive, giving an account of the past and actual state of the legislation and methods, and attempting to draw therefrom a statement of the underlying principles. The other is primarily abstract and deductive, making almost no use of history and facts, but endeavoring to reach conclusions from well defined principles. The German writers on the science of finance have of late devoted themselves almost exclusively to the first method. It is significant of the partial revulsion of feeling which has very recently taken place to notice the appearance of works which attempt to avoid some of the exaggerations of the extreme historical school, and to take refuge once again in purely theoretic discussion. For Germany, this is probably a salutary reaction, because of the comparative discredit into which pure theory had fallen. For America, it would be an unfortunate tendency, because we do not as yet possess a single work on the science of finance from the historical and comparative standpoint. We need a little more history and statistics to form the basis of our scientific superstructure.

The *Lehrbuch der Finanzwissenschaft* by Professor Umpfenbach, is strictly speaking not a new work. But as the first edition appeared about a quarter of a century ago, and as some notable additions have been made to the present volume, it may be discussed as practically a new publication. The first edition was published in 1861, just before the current toward historical economics had set in strongly; the second edition

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appears just after the tide has begun to ebb. There are hence almost no vestiges of the inductive treatment to be seen. In fact, the strong points of the work are the strictly theoretic discussions and the precision of the definitions.

The general tone of the book may be declared to be far more similar to that of Roscher, than to that of either Stein, Wagner or Schäffle. Umpfenbach is conservative throughout. He opposes the further industrial activity of the state, even in such domains as railroads; he has nothing but ridicule for the idea of a single income tax in practical life; he declares that the question of progressive taxation does not belong to the science of finance at all, because it involves the subject of communistic changes of property. These views are not very strong, at least not in the reasons alleged, but they are interesting as tending to characterize a work resembling in all these respects rather the French than the modern German authorities. But it is very doubtful whether they will exert any influence on German practice.

The only really important point of Umpfenbach's book is the methodological one. The common division of revenues of the state among French writers like Leroy-Beaulieu is domains, industrial undertakings, and taxes; corresponding to Adam Smith's old division of revenue from public lands, from public stock and from taxes. But the German writers already at an early period saw this to be inadequate, and added another category, fees (*Gebühren*), which is to be found without exception in every German work on finance to-day as occupying a position co-ordinate to that of taxes. In the Wealth of Nations they are termed "particular contributions." But the exact definition of fees as a separate category of state revenues has always been a mooted point; and no two prominent writers agree on the exact delimitation between fees and taxes. That some clear distinction is necessary, however, is confessed by all; for patently the principles of taxation cannot be the same as the principles of fees, and *vice versa*. Umpfenbach defines fees as "special payments for the cost of a financial transaction, in so far as it is necessary for political purposes; and in so far as the expenses surpass those which it would be permissible to lay on the community as such." Passing over the minor infelicities of expression we may say that this, at all events, conveys a precise meaning. Taxes are the general contributions of all to the state treasury; fees are payments for special services, with the further characteristic that these payments about correspond to the cost of service of the particular transaction. The principle of fees is accordingly the principle of cost of service; while the fees themselves are divided into payments for educational, police, judicial, military, financial and economic expenditures; the last category including fees for coinage, highway, canal, railway, post and telegraph expenses.

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This characterization of fees (of which we shall speak further in a moment) is in itself clear enough. Had Umpfenbach simply done this, his book would have rendered a signal service to the clearing up of ideas. But he adds to his three categories of fees, taxes and domains, a fourth category of fiscal (or lucrative) prerogatives, which he defines as "compulsorily reserved, exclusive rights of the state over specified kinds of property rights." The foundation of these is to be found in the mediæval *regalia*. But Umpfenbach makes this fourth category include such widely diverse revenues as the so-called poll tax, taxes on communication, taxes on the transfer of property, taxes on legacies and successions, revenue from treasure-trove, from mines, salt, tobacco, spirits and bank monopolies, and finally from licenses. Umpfenbach lays great emphasis on this division; in fact, it is the thread which runs through the whole work. But the only result would be an undue restriction of the domain of taxation, and an increased confusion as to the exact nature of taxes in themselves. What Umpfenbach gains by the separation of fees from taxes, he loses by the attempted separation of taxes from fiscal prerogatives. His methodological explanation will not commend itself on the whole, to students of finance.

In *Die Steuer*, Professor Neumann treats of much the same class of questions. Neumann is well known as one of the prominent modern writers on finance. His book on *Die progressive Einkommensteuer* still remains one of the best works on that knotty subject. In that, as in all his earlier writings, is to be found a rich fund of historical and statistical information. But in this work Neumann has undertaken to write a comprehensive treatise on the nature of taxation, from the analytic point of view. The first volume which has just appeared, is introductory, and to a great extent methodological. The twelve long chapters treat mainly of four topics: Classification of Revenues of the State, Fees *versus* Taxes, the Principle of Public Interest, and Direct *versus* Indirect Taxes. An exhaustive discussion of all these points is given, and the author shows great acuteness and dialectical skill. But three serious criticisms are to be made. The discussion is too minute, and often borders on the wearisome; the style is anything but clear; and the conclusions are not advanced with the necessary precision.

After criticising the usual method of classification of public revenues, Neumann endeavors to define fees as payments for special services of state or community, in so far, but only in so far, as the public interest is involved. This would include the tolls, *etc.*, of roads, canals, railways and telegraphs, but exclude the revenues from state monopolies. Neumann devotes over 200 pages to the discussion of public interest, and finally defines it, but in so characteristic a manner that I cannot refrain from giving it in the original:

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Oeffentliches Interesse im (objectiven) engeren Sinne ist ein auf menschliche Handlungen oder Werke bezügliches Interesse von Zielen oder Zwecken so grosser Bedeutung, dass um ihretwillen eine Auferlegung von Opfern nach herrschender Annahme gerechtfertigt ist.

In other words, 200 pages are devoted to proving that a "public interest is an interest of such importance as to justify a sacrifice on the part of the individual." Now I submit that this might have been proved in less than 200 pages; and without the formidable array of proofs and counter-proofs, of exceptions and sub-exceptions, which fairly crowd the book and bewilder the reader. To be over-exact is often as great a mistake as to be superficial, for both will surely result in confusion.

Basing his definition of fees on the principle of public interest, Neumann is logically led to oppose the view of Umpfenbach, by which cost of service is made the criterion. But Neumann is finally compelled to confess that it is often impossible to separate fees (in his sense) from indirect taxes. This is plain, for if we take public interest as the criterion, it is often impossible to distinguish a general from a special service, *e.g.* in some licenses it is almost impracticable to separate the license fee from the license tax. According to Umpfenbach's criterion the separation is simple; according to Neumann's it is wellnigh impossible. The net result of Neumann's efforts is thus to set up a distinction which does not distinguish.

Finally we must call attention to the fact that Neumann co-ordinates to fees and taxes a third source of revenue which he terms contributions (*Beiträge*), and which he is at some pains to elaborate. But here again he is forced to confess the difficulty of distinguishing between them and direct taxes. Much better is the careful discussion of the four separate methods of classifying direct and indirect taxes. Neumann finally allies himself to Parieu's method, making the distinction depend simply on the permanence or periodicity of the act; and opposing the views of Leroy-Beaulieu on the one hand, and of Wagner, Stein and Schäffle on the other. Neumann's book will prove suggestive in parts, as *e.g.* the relation of taxation and prices, but it might well have been boiled down to one-fifth its present compass. Questions of methodology are not the all-absorbing ones.

The *Saggio sul Sistema tributario* by Professor Alessio, is a most valuable work. It is modestly called an essay — *saggio* — but might better be termed a comprehensive treatise. The author indulges, to some extent, in theoretic discussions like those of Umpfenbach and Neumann; and the work is characterized by an intimate acquaintance with the scientific literature of all countries, especially that of Germany, but including that of the United States. Nevertheless the importance of the work, of which only the first two volumes have appeared, lies, with

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respect to American readers, not so much in the scientific discussions prefixed to each chapter, admirable as they are, as in the thoroughly complete and clear presentation of the history and actual condition of each tax in the Italian commonwealth. The book on which we have hitherto been compelled to depend for our knowledge of Italian finance is Morpurgo's small work, *La Finanza*, of ten years ago. Alessio's work is incomparably fuller, and it must be said also much abler. The system of public revenues as elaborated in the last twenty-five years is composed of the following elements: The taxes on real estate, including the land tax (*l' imposta dei terreni*) and the house tax (*l' imposta dei fabbricati*); the tax on the profits of personal property or movables (*l' imposta sui redditi della ricchezza mobile*); the usual indirect taxes including custom duties (*dazii di confine*); and a large variety of fees (*tasse*). Most interesting is the discussion in the second volume on the general property and income tax, to which I shall have to refer at another time and place. Of great value also is the discussion of the principles of local taxation in chapter thirteen, which Alessio rightly declares to be one of the most difficult parts of the science of finance. It will suffice here to call the attention of students to this admirable production which has been given us for Italy, a work even better than that which Kaufmann some years ago did for France. It will rank among the leading works on taxation.

EDWIN R. A. SELIGMAN.

Die landwirthschaftliche Konkurrenz Nordamerikas in Gegenwart und Zukunft. Landwirthschaft, Kolonisation und Verkehrswesen in den Vereinigten Staaten und in British-Nordamerika. Auf Grund von Reisen und Studien dargestellt von MAX SERING. Leipzig, 1887. — 8vo, xxvi, 759 pp.

As early as 1879 the British parliament appointed a commission to inquire into the depressed condition of the agricultural interests of England. This commission sent two of its members to the United States and a third to Canada in order to investigate the extent to which American competition was responsible for the fall of prices and of rents, and made its final report in 1882. Meantime the continent was beginning to feel the results of bad harvests and large importations as well as England. In 1881 Max Wirth published his book on *Die Krisis in der Landwirthschaft*, and this was followed by a large number of publications dealing with the same subject. One of the most extensive of these was Dr. Rudolf Meyer's *Ursachen der Amerikanischen Konkurrenz*, a volume of over 800 pages, based upon a journey undertaken by the author in 1881 and 1882.

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Dr. Meyer's book is cast in the form of a narrative rather than in that of a systematic discussion of the topic announced on his title-page, but he evidently made a careful study of the details of the subject, the cost of production in different parts of the country, the cost of transportation, and the other economic conditions of the problem, and his conclusion was that the production of wheat was likely to increase at a very rapid rate. He even went so far as to prophesy that the quantity exported from the United States in 1885 would be 150,000,000 bushels more than in 1880, and would amount to 350,000,000 bushels. Dr. Meyer also took occasion to condemn the policy which had been adopted by the German government since 1879, and which has, since he wrote, been carried still further, of checking foreign competition by means of import duties. It is interesting to recall that until 1879 wheat was on the free list. The tariff act of that year taxed wheat at the rate of one mark for every 100 kilogrammes and flour at the rate of 2 marks. In 1881 the duty on flour was raised to 3 marks, and in 1885 the duty on wheat was raised to 3 marks and on flour to 7.50 marks.

More than a year before the publication of Dr. Meyer's book, which took place in 1883, the Prussian government had commissioned Dr. Sering to study the same question and were so well satisfied with a preliminary report which he made, that it was decided to send him to this country in order that he might get the advantages of personal observation. This journey, the expenses of which were paid out of the funds of the *Friedrich-Wilhelm-Victoria-Stiftung* with the personal consent of the Crown Prince, lasted from February, 1883, to September of the same year and covered all of the most important wheat-producing regions of the United States and Canada.

The present volume, which is the result of that journey, is not a description of a holiday trip in the United States or a book of personal reminiscences. It is a careful, scientific investigation of the conditions of American competition. Three pages only at the end of the preface are devoted to a skeleton of the author's journey. The book proper begins with a long introductory section of 200 pages containing a description of the natural bases of agriculture in our country, the soil, the climate, the migration of population, the governmental land-policy, the technical peculiarities of American farming and kindred topics. The author then proceeds to answer for the several natural divisions of the wheat-growing area of the United States and Canada two questions: (1) How large an area of land suitable for the production of cereals still remains to be settled? (2) How rapidly is the settlement of this area likely to take place? Three great sections of the country, the Pacific coast, Canada, and the wheat-zone east of the Rocky mountains, are thus taken up one by one and studied with reference to their geological

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and meteorological characteristics, their population and their means of transportation.

This investigation of the wheat question takes up the greater part of the book, but over 100 pages are given to cattle, sheep and swine, while a short appendix treats of sugar, beer-brewing, hop-culture and distilling.

The conclusions reacned by Professor Sering are quite different from those reached by Dr. Meyer. He considers the competition of American wheat to be much less dangerous to German agriculture than that of American beef and thinks that most authors tend to exaggerate the possibilities of the former. It is true that the wheat area can, in spite of its enormous extension between 1870 and 1880, still be increased by an area greater than that occupied in 1880. That is to say, the land devoted to wheat alone in the United States and Canada in 1880 was about 40,000,000 acres, while about 50,000,000 acres may still be added to it. This, of course, represents but a small portion of the agricultural land of all kinds still waiting to be occupied. In the wheat-belt east of the Rocky mountains alone there were 159,000,000 acres suitable for agriculture still unused in 1880, an area equal to the entire productive land of Germany, German Austria and Hungary combined. Moreover most of this area lies in the prairies, where new railroads can be built with great rapidity and economy. The reasons which move the author, in spite of these striking facts, to take a comparatively sanguine view of the situation are the following: The circumstances are no longer as favorable to a rapid settlement as formerly, since the best of the land that can be taken up under the Homestead act or bought for very low prices of the railroads is already occupied. In addition to this the cultivation of wheat in America is, even with normal prices, not very profitable, and the depression of prices in recent years has actually brought about a contraction of the wheat area since 1885. If it is remembered that the population of the countries which consume our wheat, that is to say North and Central America, the West Indies and Europe west of Russia, increases at the rate of about $3\frac{1}{2}$ millions a year, it seems reasonable to expect that there will be a rise in the price of wheat within a short time. The only thing that is liable to prevent this is a cheapening of freights through improvements in the means of transportation, and such improvements, if made, are sure to require a long time for their construction. The present crisis is, therefore, to be regarded as temporary, the result of the rapid settlement of new parts of the earth and of the extension of the railroad system. Its speedy cure is to be looked for mainly in the increasing expense and difficulty of settlement in North America. As a corollary to this conclusion the author holds that the protective duties on wheat and flour, laid within recent years in Germany,

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are justified as a measure intended to prevent the cultivators of the soil from being ruined by what is merely a temporary crisis, though he frankly admits that this is done at the expense of the poorer portion of the community, since it prevents the wage-receivers from getting the benefit of cheaper food.

There is no doubt that the statistics of recent years present a strong confirmation of Professor Sering's view. They certainly have not strengthened Dr. Meyer's reputation as a prophet. In the face of his prediction that the exportation of American wheat would reach 350,000,000 bushels in 1885, the actual figures [the exportations of flour being reduced to terms of wheat in the ratio of 4½ bushels of wheat to one barrel of flour] have been as follows:

1880	180,304,180	1883	147,811,316
1881	186,321,514	1884	111,534,182
1882	121,892,389	1885	132,570,366

On the other hand one cannot help asking whether the present falling off in our exportation may not be as temporary as its great expansion a few years ago. It certainly seems to us that the author has attached an undue importance to the increase of the price of land in the United States, particularly when he allows for it in estimating the cost of production of wheat. The price of land is a consequence, not a cause of the price of wheat, and if it has been raised by speculation above the price that corresponds to its productive power, is it not reasonable to suppose that, with the reaction that is sure to come in the price of land, and with the increase in the price of wheat, there will be another period of rapid production, and that, until all the land is settled, we shall be subject to these alternations? In raising this question we do not mean to dissent from Professor Sering's conclusion but rather to suggest a possible extension of it.

The book gives evidence throughout of great research and knowledge of the details of the subject; the arrangement of the material is clear; the discussions are conducted in a broad spirit; and an alphabetical index makes the work especially valuable for purposes of reference.

HENRY W. FARNAM.

Capital and its Earnings. By JOHN B. CLARK, A.M., Professor of History and Political Science, Smith College. Publications of the American Economic Association, Vol. III, No. 2, 1888. — 8vo, 69 pp.

Professor Clark begins his monograph with an excellent discussion of the nature of capital. He finds that the word capital in economic science stands for two unlike conceptions. Capital, from one stand-

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point, is an abstract fund which is ever changing from one form to another. The owner of capital thinks of it as a permanent fund, though he may not retain it for a single day in any one form. Each material object departs from him one after the other, yet his capital remains. On the other hand, capital in the concrete consists of commodities that aid production. It is that material wealth which, while satisfying no natural want, helps men to obtain other things which will satisfy their desires.

Interest, our author uses to designate the earnings of pure capital. It has no reference to the form in which capital is invested. It merely expresses a percentage of the whole productive wealth that secures it. The earnings of concrete capital, our author terms rent. Buildings, machines, and tools, as well as farms, earn it:

> The entire income (says Professor Clark), resulting from the ownership of property is, thus, interest when regarded in one way; it is rent when regarded in another. Ascertain the total market value of all instruments of production, find what proportion of that amount these instruments annually earn for their owners, and you have the total income of the property holding class, as such, in the guise of interest. Make a list of the instruments themselves, and place opposite to the name of each the sum it annually earns, add these amounts, and you have the total income of the property owning class, as such, in the guise of rent. (p. 29.)

If this thought be carried to its logical consequences, a new and clearer view of capital can be obtained, which will avoid many of those confused notions which now baffle the earnest student in his endeavor to gain a comprehensive view of the subject, and thus make plausible many of those heresies which retard economic progress.

Upon this discussion I have but one comment to make, and that is as to the use of words. The terms interest and rent are used in another sense in some of the most valuable discussions in economic science, and only confusion can arise from their use in another way, even though the new distinctions are as valuable as the old ones. This is clearly brought out in the latter part of the essay, where the land problem is treated. Here interest and rent are used to represent, not the whole income of productive capital viewed in different ways, but in that narrow sense as the return obtained by different kinds of wealth. What the reader has to learn in order to understand the first part of the essay, he must, in a degree, unlearn in order to understand the latter part. One of the great needs of our science is the introduction of additional terms, so that no word will be used in more than one sense. Professor Clark loses a rare opportunity to impress the importance of his original views upon others when he chooses to use old words in a new way rather than to endeavor to enrich the science by introducing new ones.

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Professor Clark's views of rent, as outlined in this essay, deserve especial attention. They are so unlike those stereotyped discussions which fill our text-books that no short account of them can do the author justice. Perhaps the following quotations will give a clearer insight into his original views and method of investigation than can be presented in the same space in any other way:

> What law of rent, then, can govern the earnings of this aggregation of unlike utilities? A utility that is original and indestructible, but so abundant as to be valueless, a utility that results from social growth, and is a subject of limited monopoly, three unlike utilities capable of being created by labor, — such is land in the economic sense. . . . No single principle can govern the permanent returns from an article that is an aggregation of one monopoly and three manufactured utilities. No single principle can govern the permanent rent of land. (p. 37.)
>
> The total earnings of a piece of land are a composite of three rents that are, in a general way, normal, and one market rent that is fixed at a scarcity rate. (p. 46.)
>
> The importance of these principles lies in their bearing on future rents. The earnings of the single utility in land that is a monopoly tends to rise as population increases; the returns of the three utilities that are industrial products tend to fall as wealth accumulates and processes are perfected. The permanent rent of land in its entirety is a resultant of these opposing forces; it is the sum of four rents, one of which tends upward and the others downward. (p. 47.)
>
> The effect of higher civilization is to cause the artificial utilities of agricultural land to predominate over the natural ones, and to thus subject this complex instrument more and more to the law of normal rent. The element in land that is a monopoly is losing its relative importance. (p. 54.)

There is only one of the many topics which Professor Clark handles which is to me unsatisfactory, and that relates to the discussion of the no-rent problem. This is the only case where he retains the orthodox view of rent; nor does he bring into the discussion of this problem any of those new points of view which characterize the other parts of the essay. In places he seems to belittle the whole subject, and once utters the surprising statement that it is a matter of scientific indifference whether or not any no-rent land exists.

If the only use to be made of no-rent land was to furnish a measure of the rent of other tracts, it would indeed be of little importance whether or not such lands existed. Many problems of the distribution of rent, however, are determined by the presence of such lands, and it is in the settlement of these problems that the real importance of the no-rent land lies. If there are at the margin of cultivation large quantities of land which would go out of use if the price of produce were reduced, the present distribution of wealth cannot be materially

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modified without much greater social changes than would be the case if but little or no land lies at the margin of cultivation. There is, to my mind, no one thing that so much determines the opinions of each economist concerning the problems of distribution as does his decision upon this question of the amount of no-rent land.

SIMON N. PATTEN.

Strafensystem und Gefängnisswesen in England. Von Dr. P. F. ASCHROTT, Amtsrichter. Berlin und Leipzig. Verlag von S. Guttentag, 1887. — xx, 311 pp.

This book, as its title indicates, is divided into two parts, each of which treats of a separate and distinct portion of the general science of penology. The first is devoted to a short description of the criminal law and procedure and the organization of the criminal courts of England, while the second gives an elaborate account of the prison system as at present organized. In the first part many of the various questions that come up for consideration are treated from the historical standpoint. Thus the matter of transportation of convicts, although for a number of years it has totally ceased to be made use of, is treated with a good deal of detail on account of the great influence it has had not only in the criminal law but also on the prison system of England. No one who has devoted attention to this sort of questions can fail to recognize the great value which a book acquires from this method of treatment. Things which otherwise would never be quite clear to the reader are brought out in such a way as to make it absolutely impossible for them to be misunderstood, while at the same time the interest of the book as a bit of *culturgeschichte* is very much enhanced.

But whatever may be the value of the first part of the work as an epitome of English criminal institutions, it is in the second part, which is devoted to prison management, that the author excels. He not only shows a much wider knowledge of the subject, but it is quite evident that this is the part of his work which has interested him the most, and on which he has spent the most time. He has not contented himself with a careful perusal of the literature, both English and German, of his subject, but he has personally visited all the important English prisons and talked with all the most noted of the English prison authorities, among whom are specially to be mentioned Sir Edmond Du Cane, the present head of the English prison system, and Captain Harvey, the governor of the great convict prison of Wormwood Scrubbs, devoted entirely to the keeping of prisoners during the stage of solitary confinement. Dr. Aschrott's treatment of the subject of prison management is altogether admirable. One chapter is devoted to prison organization, where an

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account is given of the present centralization in the management of prisons, which, it will be remembered, have since 1877 been taken under the direct charge of the central government in order that some system and order might be introduced into prison administration; another chapter is devoted to "prison arrangements," under which heading such matters as supervision, specialization of prisons for different classes of prisoners, prison architecture and the cost of the prisons are treated. The third and last chapter is devoted to the treatment of prisoners, and is on the whole the most interesting in the entire book.

Although English penal science makes a distinction between what are known as "convict prisoners" and "local prisoners," as a result of which each class of prisoners is placed in a separate and independent set of prisons, still the ideas which underlie the treatment of each of these classes of prisoners are the same. These are, in the first place, that criminal punishment shall be such as to exercise a deterrent effect on the community at large. Therefore the treatment of prisoners shall not be such as to make their lot in any particular as good or as comfortable as that of an honest laborer, however poor he may be. In the second place, while the deterrent effect of the punishment is always to be kept in view, it is not to be lost sight of that much may be done during the prisoner's residence in a penal institution towards a reform of his character and towards making him capable of joining the ranks of society, at the time of his dismissal, as an honest and willing laborer. In order to meet these ends the term for which the prisoner is sentenced is, when long enough, divided into three parts. The first of these is known as the term of solitary confinement. During this period, whose length varies with the length of the sentence, but which never, whatever its length, exceeds nine months, the prisoner is kept in his cell apart from all other prisoners and is obliged to work at some suitable occupation. The purpose of thus confining him is to awaken, if possible, a feeling of penitence for what he has done, and a desire to reform in the future. During the period of solitary confinement his fare and the conveniences of his cell are much more limited than they are later, the hope being that the misery of his present condition will be such as to keep continually before his mind the fact that he is atoning for his misdeeds. After the period of solitary confinement has expired, the prisoner is allowed to work with comrades, although at night no one is allowed to share his cell. The remainder of his sentence is served out in this way in work with companions, but during this time, in so far as he behaves himself and refrains from actual disobedience of the regulations of the prison, he is more or less quickly advanced to stages, as they are called, in each of which the privileges accorded to prisoners vary; the rule being that the more advanced the prisoner is, the greater the privileges

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he shall enjoy. The passage from one stage to another depends on an elaborate marking system graded for the most part according to the industry of the prisoner. In this way the attempt is made to instil into his mind the belief that his condition is dependent in the main upon himself, since a prisoner by attending to the duties assigned to him and doing his work faithfully and promptly may lessen the term of imprisonment by nearly one-fourth. Those prisoners who by good conduct are thus enabled to lessen the term for which they were imprisoned are, at the expiration of the term served, discharged conditionally; that is, they remain, for the remainder of the term for which they were originally sentenced, under the supervision of the police, to whom they must report their changes of residence. During this time they must also refrain from going in bad company, and must make it evident that they intend to become harmless, if not useful, members of the society against which they have rebelled. This is, in brief, the system of treatment of prisoners which Dr. Aschrott so ably describes, and is termed by penologists the "progressive system," its main idea being to awaken in the prisoner the desire to lead a right life after the time of his discharge.

One thing which at this time deserves special notice in the treatment of prisoners is the method adopted by the English government for their employment at productive industry. The same complaints have heretofore been raised in England which are now being raised in the state of New York, and which have led to the abolition of contract labor in our prisons. This system of employing prisoners has also been abolished in England, and has given place to the state account system, in accordance with which the prisoners are set at work at things which some other department of the government can use. Thus the convicts make mail-bags for the post-office, do book binding for the government printing office, and so on, while a very large part of them are employed in the building of important public works such as those at Dover, or in the reclamation of the moors at Dartmoor. In this way their work does not come into direct competition with that of the laboring man, since the articles made by prison labor are not put upon the market and sold, but are consumed by the government. Of course I would not be understood as meaning that this method of employing prisoners does not really affect the price of labor to some extent, since the labor which is done by the convicts would otherwise have to be paid for by the government, and thus the demand for honest labor would be greater than under the present system. But since the state consumes all of the articles made in its prisons, the articles manufactured are not thrown immediately upon the market, and English workmen, so Dr. Aschrott says, do not feel that they are injured by competition with the prisons.

FRANK J. GOODNOW.

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A Treatise on Constitutional Conventions. By JOHN ALEXANDER JAMESON, LL.D. Fourth edition. Chicago, Callaghan & Company, 1887. — 8vo, 684 pp.

This work has been so long before the American public, has passed through so many editions, has been so frequently reviewed, and is so universally regarded as high authority upon the subject which it treats, that any extended mention of it at this time, by way either of commendation or criticism, would be superfluous. There is one general remark, however, which I think should be made about this book, and one special subject treated in it to which I think attention should be drawn more pointedly than has been done hitherto by any of its reviewers. In the first place and as regards the first consideration, this fourth edition manifests the alertness of the author in detecting the line of development of the American state. In his treatment of the fundamental question of all political science and public law, *viz.*, the question of sovereignty, he has worked himself entirely clear of what we may term our mediæval conception, and has come out fully upon the impregnable ground that sovereignty is originally, wholly and indivisibly in the United States as a national state (p. 54). This principle followed to its logical conclusions will certainly annihilate the system of public law built upon the old doctrine of a division of the sovereignty between the states and the United States. History, natural conditions and relations have already done just that, and it is a matter of great importance to the advancement of our political science and constitutional law that so high an authority as Judge Jameson has made this discovery and given expression to it in our political and legal literature.

In the development of this principle, Judge Jameson enounces a doctrine in reference to the character and place in our system of the state constitutional convention and of the act of the people resident within a state in the formation of its constitution, which, I will venture to affirm, is, at least, novel to the great mass of our constitutional lawyers, but which, in my humble opinion, is completely rational and entirely sound and gives us the thread of escape out of many a labyrinth of difficulties, through which our jurists and publicists have been long aimlessly and hopelessly wandering. He writes, on page 65 :

> Under the constitution of the nation, comprising the Federal and all the state constitutions, each state is permitted by the sovereign to frame for its own people its local constitution, subject always to the guaranty of the national government. In performing that work, state conventions and legislatures often assume the airs and the language of representatives of real sovereigns. In truth, however, a state is not a sovereign. In passing upon a local constitution, the people of a state are performing a *delegated* function, — exercising, by permission and in behalf of the people of the United States, a sovereign power belonging only to the latter.

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The language here is not quite scientific, for a political organization which has no sovereignty is not, strictly speaking, a state at all, and we should use some other name to describe it, such, for example, as commonwealth, province, *etc.*; and if the sovereign people in our system is a national concept, then we should not use, in our political and legal terminology, the phrase, "the people of a state," but instead thereof, the people of the United States resident within a state. The idea, however, which the author means to convey is clear, and his proposition is, it seems to me, irrefutable.

J. W. BURGESS.

Gesetz und Verordnung. Von Dr. Georg Jellinek, Professor des Staatsrechtes an der Universität Wien. Freiberg I. B. 1887. Akademische Verlagsbuchhandlung von J. C. B. Mohr, (Paul Siebeck.) — 8vo, 412 pp.

The most pertinent question of this day in reference to the science and practice of government is the proper admeasurement of the domains of the legislative and administrative powers and the proper regulation of their relations to each other. During the last half century of the world's political history there has been a steady encroachment of the former upon the latter. Up to a certain point this was a sound movement; but in some of the states of the world that point has been passed and, in these, the legislature now controls the administration to a degree which is felt to be hurtful to the public welfare. There is great need of a thorough-going analysis of this most important subject. Under the modest title, *Gesetz und Verordnung*, Statute and Ordinance, Dr. George Jellinek, Professor of Public Law in the Imperial University at Vienna, one of the foremost publicists of the age, has met this need and has laid the scientific world under an obligation, which should be duly and generously acknowledged.

Dr. Jellinek devotes the first division of his book to the historical adjustment of the relations between statute and ordinance, between the legislative and administrative powers, in England, France, Germany, Austria and Belgium, and touches upon the analogies to the same in the history of Greece and Rome and of the United States. I have seldom, if ever, read so much instructive political and legal history in 180 pages of text as Dr. Jellinek here presents. He hereby places his readers upon a vantage ground for a comprehension of the philosophy of the subject which can, in no other wise, be attained.

The second division of the work is devoted to the theory of the subject. If in the first division Dr. Jellinek has shown himself to be an historian of the first rank, in the second he has vindicated his title to be classed among the first political scientists of the age. His presenta-

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tion of the idea of the state, its purposes, organs and functions, is a marvel of clear and advanced thinking. His treatment of the question of sovereignty clears the ground of a tangled debris of illogical thought, which has always proved the greatest hindrance to the progress of the student of political science.

With this double preparation from history and the science of the state, Dr. Jellinek leads his readers, finally, to the philosophy of the specific subject. His delimitation of the respective realms of legislation and of administration and his adjustment of their relations to each other are clear and exhaustive. I can find little in them to criticise and everything to commend. No student of political science and public law can claim to be master of the most modern literature of his subject until he has thoroughly read and digested this work.

J. W. BURGESS.

Practical Statistics: A Handbook for the Statistician at Work, Students in Colleges and Academies, Agents, Census Enumerators, Etc. By CHARLES F. PIDGIN, Chief Clerk of the Massachusetts Bureau of Statistics of Labor. Boston: The William E. Smythe Company, 1888. — 8vo, 201 pp.

The author of this work has been for fifteen years chief clerk of the Massachusetts bureau of labor statistics, has been engaged in two state censuses and one Federal, and is perhaps the best practical statistician in America. He is the inventor of numerous arithmetical and calculating machines and of other devices for saving labor and reaching from complicated statistical material results hitherto impossible. The two volumes of the Massachusetts census of 1885 which have been published give ample evidence of his skill and the comprehensive value of his methods. This volume gives the results of his experience and a full view of the interior workings of what is undoubtedly the best statistical office in America and which is probably not excelled in Europe. It describes in detail the preparation of the schedules, the instruction to enumerators, the tabulation of the returns, the presentation of results, and discusses the application of statistics, their illustration by diagrams, the teaching of practical statistics, the position of the statistician, *etc.* It cannot fail to be of the utmost value to the heads of our statistical bureaus and to the statisticians of our boards of trade and other commercial bodies and private associations, who so often enter on their work without the slightest knowledge of statistical methods.

The book, however, is intended for and deserves a far wider circle of readers than the comparatively limited number of practical statisticians. It should be read by every student of statistical science, by

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every teacher of political economy or of any of the social sciences where statistics are used, and by all who desire to use statistical information in a scientific spirit. As the author very justly observes, most of the labor in statistical science has been in the direction of criticising the results rather than of perfecting the method or pointing out how better results can be obtained. The public use the final figures, making them prove what they think they prove, without examining their exact meaning. But the value of statistical results depends chiefly on the way in which they have been obtained. It seems a very easy thing to ask questions, but practical experience shows that certain questions are always misunderstood, and that others cannot be answered by the parties concerned. Concerning the Massachusetts census, Mr. Pidgin points out in a very frank way the questions to which the answers were so confused and discrepant that no use could be made of the returns. Capital employed in farming could not be obtained, because farmers keep no books. Acreage devoted to the larger crops was given without trouble, but that devoted to garden produce could not be obtained because the patches are so small and mixed together. Dairy products were a comparative failure because farmers could not distinguish, as they were asked to do, between milk sold, used in the family, fed to calves, used for butter, *etc.* This process of differentiation between inquiries which can be successfully prosecuted and those which cannot will be of immense value to all who use statistics and to statistical science.

Equally interesting and valuable is it to know just what questions ought to be asked in order to get information about any one subject. An example of this is found in the statistics of capital invested. It is easy to say that we ought to have statistics of capital. Mr. Pidgin points out just what ought to be demanded from the manufacturers and how the census return of capital employed differs from the book-keeper's balance sheet of assets and liabilities. Another example is under the head of wages where the questions that are of real interest, such as the highest and lowest number of men employed, the actual wages paid in detailed occupations, the classification of wages, the hours of work, over-time, number of days worked during the year, the full capacity of the factory, *etc.*, are put with such skill as to give the greatest amount of information. The above points and many others are valuable contributions to statistical method, the more valuable because founded on actual experience. The study of this book will lead to a greater appreciation of the difficulties of statistical investigation and also to a more exact use of statistical results.

RICHMOND MAYO SMITH.

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